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No. 92-—

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P. S. TUCKER,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Illinois

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Illinois Supreme Court err when it concluded, in direct conflict with this Court's subsequent decision in *Morales v. Trans World Airlines*, that Section 1305 of the Airline Deregulation Act of 1978 did not pre-empt state law damage claims relating to the rates and services offered in an airline's frequent flyer program, on the ground that Section 1305 can never pre-empt damage claims that are based on state common law or state statutes of general applicability?

2. Did the Illinois Supreme Court err when it concluded, in direct conflict with the prior decision of the U.S. Court of Appeals for the Seventh Circuit in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, that damage claims under the Illinois Consumer Fraud Act and under state common law were not pre-empted by Section 1305, on the ground that Section 1305 can never pre-empt damage claims that are based on state common law or state statutes of general applicability?

3. Did the Illinois Supreme Court erroneously conclude that paramount federal interests in promoting airline competition and in protecting interstate commerce did not preclude state common law and statutory damage claims that relate to the rates and services offered in airline frequent flyer programs?

RULE 29.1 STATEMENT

Petitioner is wholly owned by AMR Corp., a Delaware Corporation, and owns 49% of DFW Terminal Corp., a Texas corporation.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion and judgment of the Illinois Supreme Court is reported at 598 N.E.2d 533, and is reproduced in the Appendix to this petition ("App.") at 1a-11a.

JURISDICTION

The opinion and judgment of the Illinois Supreme Court was entered on March 12, 1992. On May 12, 1992, Justice Stevens extended the time for filing the instant petition to August 9, 1992, and the petition has been filed by that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause, Art. I, Sec. 8 of the United States Constitution; the Supremacy Clause, Art. VI of the United States Constitution; and 49 U.S.C. § 1305(a)(1), which provides as follows:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

STATEMENT OF THE CASE

The principal question in this case is whether the pre-emption clause of the Airline Deregulation Act of 1978, codified at 49 U.S.C. § 1305(a)(1), pre-empts state common law and statutory damage claims that relate to the rates and services offered to participants in an airline's frequent flyer program. In the decision below, the Illinois Supreme Court ruled that Section 1305 does not pre-empt such damage claims when they arise, as here, under state common law or state statutes of general applicability. App. 1a, 4a.

In *Morales v. Trans World Airlines*, 112 S.Ct. 2031 (1992), this Court squarely rejected the analysis applied by the Illinois Supreme Court to decide this case. Finding "little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general" law, *id.* at 2038, the Court concluded that Section 1305 pre-empts *all* state law having a connection with or reference to an airline's rates, routes, or services, "even if the law is not specifically designed" to regulate airlines. *Id.* (quotation omitted).

This Court should thus grant certiorari, vacate, and remand for reconsideration in light of *Morales*. That is how the Court disposed of the petition in *Northwest Airlines, Inc. v. West*, 112 S.Ct. 2932 (1992). The Illinois Supreme Court's decision in this case, which pre-dated *Morales*, was explicitly based on the construction of Section 1305 adopted by the Ninth Circuit in *West*.[1] It follows *a fortiori* that the same disposition is required here. Point I.

Alternatively, if the Court determines that remand is not appropriate, certiorari should be granted in order to resolve a direct conflict between the decision below and the decision of the Seventh Circuit in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F. 2d 751 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990), and to review the important questions presented by this case. Point II.

A. Background.

Petitioner American Airlines, Inc. ("American") is an interstate and international air carrier incorporated in Delaware, with its principal place of business in Texas. In 1981, American established the first frequent flyer program, known as the "AAdvantage" Program, as a service for American's customers. AAdvantage members accrue mileage credits which they can then exchange, subject to the terms and conditions of the Program, for tickets on domestic or international flights.[2] In effect, members pay for airline services with mileage credits.

AAdvantage Program membership has dramatically expanded since 1981 and now includes millions of participants, including residents of all 50 States and numerous

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[1] *See West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990).

[2] Mileage credits can be earned in a variety of ways and can be exchanged for services that do not involve air travel. Those non-flight services are not at issue in this litigation.

foreign countries. Throughout this period, American has modified the AAdvantage Program in many respects to keep pace with its competitors. Over the years, the flights and airline services available to AAdvantage participants have vastly increased.[3]

B. The Proceedings Below.

Respondents are two Illinois residents and one Connecticut resident. They filed parallel suits, later consolidated, in Illinois state court, purporting to represent a nationwide class consisting of all AAdvantage Program participants. Respondents acknowledged that American explicitly "reserved the right to restrict, suspend, or otherwise alter aspects of the Program." Tucker Complaint, Count I, ¶ 12; App. 45a. Nevertheless, they challenged modifications to the Program that American announced in May, 1988, contending generally that the modifications decreased the "value" of accumulated mileage credits for Program participants "wishing to pay for flights with free travel awards." Wolens Complaint, Count I, ¶ 14; App. 33a.[4]

In particular, respondents challenged American's modification concerning the number of seats on particular flights that American allocates to AAdvantage participants (capacity controls), and its modification of the specified dates on which certain kinds of AAdvantage awards cannot be used to purchase seats (blackout dates). Respondents contended that American's modifications restrict the ability to use AAdvantage award certificates to obtain "free air travel on any available date," and to

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[3] For example, American has greatly expanded the routes it serves, particularly to international destinations. In all cases, AAdvantage participants can use mileage credits accumulated before those routes were expanded to purchase flights to those new destinations.

[4] Respondents did not complain of the many modifications to the Program that have increased the "value" of their previously accumulated mileage credits.

reserve "any available seat in the class of service provided." Wolens Complaint, Count I, ¶ 13; App. 33a.

Respondents claimed that American's modifications to the AAdvantage Program violated the Illinois Consumer Fraud and Deceptive Business Practices Act ("the Consumer Fraud Act"), Ill. Rev. Stat. ch. 121½, sec. 261 *et seq.*, because American allegedly did not advise Program participants that American "believed it had reserved the right to retroactively restrict, suspend or otherwise alter or reduce" the rates and services it would make available to them. Tucker Complaint, Count III, ¶ 15; App. 51a; Wolens Complaint, Count III, ¶ 15; App. 37a. Respondents also claimed that applying the modified terms to mileage credits accumulated before May 1988 constituted a common law breach of contract, even though American had expressly reserved the right to modify the terms of the AAdvantage Program. Tucker Complaint, Count I, Para. 20; App. 47a; Wolens Complaint, Count I, Para. 15; App. 33a. Respondents contended that both their Consumer Fraud Act claim and their contract claim entitled them to compensatory and punitive damages. Respondents also demanded an injunction requiring American to reinstate its pre-1988 travel award structure for mileage credits accumulated prior to May 1988, and barring future program modifications that would affect the use of those credits.[5]

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[5] Most of the millions of members of the proposed class do not reside in Illinois, and their claims have no connection whatsoever with Illinois. Nevertheless, respondents relied on Illinois law to support their claims. Respondents contended that statements American made outside of Illinois to AAdvantage members who have no connection with Illinois violated the Illinois Consumer Fraud Act. Respondents also contended that the relationships between American and Program participants throughout the nation are contractual relationships under *Illinois* common law, and contended that American breached those contracts in violation of Illinois common law when it implemented the two Program modifications described above.

In the trial court, American moved to dismiss all of respondents' statutory and common law claims on the ground that they are pre-empted by the express pre-emption clause of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a)(1).[6] American also sought dismissal on the ground of implied pre-emption, and under the Commerce Clause. The trial court denied American's motion to dismiss but certified its ruling for interlocutory appeal. App. 22a.

C. The Illinois Supreme Court Ruling.

On review, after an intervening appellate court decision (App. 12a), the Illinois Supreme Court correctly held that Section 1305 expressly pre-empts respondents' claims for injunctive relief because "injunctive relief would involve the regulation of defendant's services and therefore violate section 1305." App. 4a. The court also ruled, however, that respondents' "claims for damages for breach of contract and violation of the Consumer Fraud Act" are *not* pre-empted. App. 4a. The principal basis for that holding was the court's explicit adoption of what it incorrectly characterized as:

> the prevailing view, set forth in *West v. Northwest Airlines, Inc.* (9th Cir. 1990), 923 F.2d 657, that "section 1305(a)(1) pre-empts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services."

App. 4a.[7] The court thus "narrowly construed" § 1305(a)(1) "to pre-empt only those State laws and regula-

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[6] Section 1305 provides in pertinent part that "no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . . ." This pre-emption provision was in effect when American initiated the AAdvantage Program.

[7] The court made no attempt to ascertain, from the text of the Airline Deregulation Act or otherwise, the intent of Congress in enacting that Act and its express pre-emption clause.

tions that *specifically* relate to . . . an airline's rates, routes or services." App. 4a (emphasis added).

By construing the statutory language "any law . . . or other provision having the force and effect of law relating to rates, routes, or services" to include only laws that "*specifically*" relate to rates, routes, or services, the Illinois Supreme Court effectively preserved all state common law damage claims and all other state damage claims based on statutes or regulations that do not specifically target airlines. The court made no effort to explain why injunctive relief under laws that are not directed specifically at airline rates, routes, or services is pre-empted, but damage relief under those same laws is not.[8]

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[8] The Illinois Supreme Court also rejected American's implied pre-emption and Commerce Clause arguments. It ruled that 49 U.S.C. § 1506 preserved respondents' damage claims from implicit pre-emption. App. 5a. Noting that it had already held that claims for injunctive relief would be pre-empted by Section 1305(a)(1), it ruled that "further discussion of defendant's commerce clause argument is unnecessary." App. 5a. However, because American's Commerce Clause argument was asserted against damage claims as well, the court's refusal to dismiss those claims necessarily rejected that argument. In American's brief to the Illinois Supreme Court, American squarely argued that "because Plaintiffs' money damage claims have the same impermissible and burdensome effect on interstate and international commerce as their injunction claims, the Appellate Court erred in declining to reach the Commerce Clause issue." Brief and Appendix for Defendant-Appellant American Airlines, Inc., p. 42, n.18. Thus, it is clear that American properly preserved its Commerce Clause arguments.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE ILLINOIS SUPREME COURT IS FLATLY INCONSISTENT WITH, AND MUST BE RECONSIDERED IN LIGHT OF, *MORALES v. TRANS WORLD AIRLINES*.

A. *Morales* Demonstrates That The Pre-emption Analysis Adopted By The Illinois Supreme Court Was Erroneous.

The Illinois Supreme Court's decision conflicts directly with this Court's subsequent ruling in *Morales v. Trans World Airlines*, 112 S.Ct. 2031 (1992). *Morales* set forth the test for whether Section 1305 pre-empts state law: "State enforcement actions having *a connection with or reference to* airline 'rates, routes, or services' are pre-empted." 112 S.Ct. at 2037 (emphasis added). The Court made clear that the language of Section 1305, like the similarly worded ERISA pre-emption provision, has "an expansive sweep" and is "conspicuous for its breadth." *Id.* (quotations omitted).

The Illinois Supreme Court acknowledged that respondents' claims against American involve airline "rates, routes or services," and so held when it pre-empted the claims for injunctive relief.[9] It nevertheless ruled that respondents' *damage* claims were *not* pre-empted by Section 1305. In so ruling, the court ignored the precise terms of Section 1305 and the congressional purpose in enacting that provision, and failed to give "expansive sweep" to Section 1305's "relating to" language.

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[9] That conclusion is inescapable. Respondents claimed a state law right to purchase any seat on any American flight (*i.e.*, airline "services"), at particular AAdvantage fares (*i.e.*, "rates"). They directly challenged American's right to allocate the number of seats available on any given flight to passengers who want to purchase a ticket with AAdvantage travel awards. Nothing could relate more directly to the services of an airline than the number of flights and seats a carrier makes available for passengers who want to purchase a ticket and reserve a seat.

Without meaningful analysis, the court adopted what it incorrectly described as "the prevailing view set forth in *West v. Northwest Airlines*," that:

> section 1305(a)(1) pre-empts claims *only when the underlying statute or regulation itself relates to airline services*, regardless of whether the claim arises from a factual setting involving airline services.

App. 4a (emphasis added).[10] As Chief Justice Miller confirmed in his concurring opinion, the sole basis for the Illinois Supreme Court's conclusion that respondents' damage claims were not pre-empted was "the majority's proffered distinction between laws of general application and laws of specific application." App. 7a.

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[10] The Ninth Circuit's ruling in *West* was actually a minority position. *Compare Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir.) (Section 1305 pre-empts state statutory law of general applicability as applied to airfare advertising), *cert. denied*, 111 S.Ct. 307 (1990); *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir. 1989) (Section 1305 pre-empts state common law of general applicability as applied to terms and conditions of air passenger's ticket); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989) (Section 1305 pre-empts state statutory and common law of general applicability as applied to advertising of discount airfares), *cert. denied*, 495 U.S. 919 (1990); *Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C. Cir. 1987) (Section 1305 pre-empts state common law claims of general applicability as applied to dispute over airline seating). In fact, the analysis adopted in *West* has not uniformly been applied even within the Ninth Circuit. *See Federal Express Corporation v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 2956 (1992). This Court's treatment of *Federal Express* is illuminating. The petition for certiorari in that case was held pending the decision in *Morales*. After *Morales* was decided, the petition was denied. In *Federal Express*, the Ninth Circuit held that Section 1305 pre-empted certain state tariffs as applied to the ancillary trucking operations of air courier services, even though those laws applied to all intrastate trucking operations and did not specifically target airline services. By letting that decision stand, while vacating and remanding *West*, the Court made clear that the analysis in *West* was incompatible with *Morales*.

In *Morales*, this Court explicitly considered and flatly rejected precisely the analysis applied by the Illinois Supreme Court to decide this case. *Morales* held that reading Section 1305 to pre-empt "only State laws specifically addressed to the airline industry" would create "an utterly irrational loophole." 112 S.Ct. at 2038. The opinion made plain that "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Id.* The Court concluded that the distinction between laws of specific and general applicability that is the basis of the decision below "ignores the sweep of the 'relating to' language" in Section 1305. *Id.* Drawing on ERISA precedents, the Court held that a state law can "relate to" airline rates, routes, or services "even if the law is not specifically designed" to affect airline rates, routes, or services, "or the effect is only indirect." *Id.*[11]

B. *West* and *Cipollone* Confirm That The Pre-emption Analysis Adopted By The Illinois Supreme Court Was Erroneous.

This Court vacated and remanded the Ninth Circuit's decision in *West v. Northwest Airlines* for reconsideration in light of *Morales*, presumably because *West*'s interpretation of Section 1305 rested on the erroneous distinction between general and specific laws. 112 S.Ct. 2932 (1992). The Illinois Supreme Court's express reliance on *West* requires identical treatment here.

Indeed, given the similarities between *West* and the ruling below, this Court's disposition of *West* precludes any argument by respondents that certiorari should be denied in this case. *West* also involved state common law

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[11] Quoting from *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 483 (1990) (ERISA "relating to" language pre-empts state law "even if the law is not specifically designed to affect . . . plans, or the effect is only indirect").

compensatory and punitive damage claims.[12] The opinion in *Morales* makes clear that the Court perceives no distinction for pre-emption purposes between statutory and common law claims: "This case therefore appears to us much like *Pilot Life*, in which we held that a common-law tort and contract action seeking damages . . . was pre-empted." *Morales*, 112 S.Ct. at 2039. And this Court's disposition of the petition in *West* confirms that its ruling in *Morales* applies not only to statutory claims, but also to common law claims.[13]

This Court's recent decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), also confirms that the common law claim at issue here should not be treated differently from the statutory claim for pre-emption purposes. As Justice Stevens' opinion states, "[s]ince *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), we have recognized the phrase 'state law' to include common law as well as statutes and regulations." 112 S.Ct. at 2620. Section 1305 expressly pre-empts *all* state law. Accordingly, Section 1305 clearly pre-empts common law claims. *Cipollone* emphasized that even the statutory phrase "no requirement or prohibition," which is much narrower than the "expansive" statutory phrase at issue here, "sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Id.* (citation omitted). *See also id.* at 2632 (Scalia, J., dissenting).[14]

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[12] 923 F.2d at 658-59 ("West . . . filed claims in state court for breach of the covenant of good faith and fair dealing under Montana law . . . seeking both compensatory and punitive damages").

[13] In any event, this case, like *Morales*, also involves a statutory claim.

[14] The Court's recent ruling in *Gade v. National Solid Wastes Management Association*, 112 S.Ct. 2374 (1992), makes clear that pre-emption analysis does not depend upon the purpose for which a State enacts or enforces a law. Rather, pre-emption analysis must

C. Under The Correct Pre-emption Analysis, The Decision Of The Illinois Supreme Court Cannot Stand.

The conclusion of the Illinois Supreme Court that respondents' damage claims survive Section 1305 is clearly erroneous under the test established in *Morales*. The state airfare advertising restrictions at issue there, which were contained in the Guidelines of the National Association of Attorneys General ("NAAG Guidelines"), were pre-empted by Section 1305 because they: "establish binding requirements as to how tickets are to be marketed," "creat[e] an enforceable right" to a particular fare "when the advertisement fails to include the mandated explanations and disclaimers," and have a "significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fare they charge." *Morales*, 112 S.Ct. at 2039-40.

The claims pressed by respondents likewise seek to create "binding requirements" and "enforceable rights" between American and millions of AAdvantage members. The relief respondents seek would require American to accept pre-1988 mileage credits as payment for "any available seat in the class of service provided." Wolens Complaint, Count I, ¶ 13; App. 33a. Moreover, respondents' claims seek restrictions on an airline's ability to use capacity controls and blackout dates that are similar to the restrictions on capacity controls and blackout dates contained in the NAAG Guidelines, other portions of which were at issue in *Morales*.[15] If respondents pre-

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also consider the "practical impact" of state enforcement. 112 S.Ct. at 2387 ("Whatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field.").

[15] *See Morales*, 112 S.Ct. at 2041, 2048-52 (setting forth NAAG Guidelines). Excerpts from those Guidelines are reprinted in the Appendix at App. 55a. The Guidelines specifically provide that an airline imposing "capacity controls" on the availability of frequent flyer awards "must clearly and conspicuously disclose in its frequent flyer program solicitations, newsletters, rules and other bulletins the

vail, Illinois law will in effect require compliance with the provisions of the NAAG Guidelines that restrict carriers' ability to use capacity controls and blackout dates to maintain a reasonable balance between the demands of revenue paying passengers and the travel services provided to frequent flyer program participants.

Capacity controls and blackout dates are commonplace features of frequent flyer programs. Indeed, the United States Department of Transportation has recently endorsed them as "legitimate methods for controlling the cost of frequent flyer plans" and has noted that, "[w]ithout such restrictions, carriers might choose to terminate or cut back the programs." DOT Order in Nos. 46280, 47539 (May 29, 1992) at 13; App. 81a. DOT concluded that enforcement of the capacity control and blackout provisions of the NAAG Guidelines would have a significant impact upon airlines' ability to control the costs of frequent flyer programs. DOT Order at 4, 4 n.3, and 13; App. 69a and 81a.[16]

This Court has ruled that the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), compel deference to reasonable agency interpretations of the pre-emptive scope of federal statutes administered by the agency. *E.g., Massachusetts v. Morash*, 109 S.Ct. 1668, 1673-74 (1989) (deferring to agency interpretation of ERISA pre-emption language).[17]

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specific techniques used . . . to control capacity." NAAG Guidelines § 3, 3.0.1; App. 56a. Likewise, the Guidelines restrict the ability of airlines to alter the availability of flights for so-called "vested members," unless the airline has made a previous disclosure in the precise terms and using the precise method prescribed in the Guidelines. *Id.* § 3, 3.1.1; App. 57a.

[16] Similarly, in *Morales*, the Court concluded that enforcement of the portions of the NAAG Guidelines at issue there would have a "significant effect" on airline fares. 112 S.Ct. at 2040.

[17] The Court noted in *Morales* that DOT "retains the power" to prohibit airline practices that do not promote competition, and

DOT's order thus confirms what the statutory text and this Court's ruling in *Morales* make plain: Section 1305 expressly pre-empts the state law claims at issue here. As DOT stated:

> state contract laws of general applicability cannot authorize a determination of whether individual terms and conditions of a carrier's program are fair and reasonable, to the extent they relate to an airline's rates, routes and services. Such state regulation is preempted under section 105 [49 U.S.C. § 1305] of the Act.

DOT Order at 15; App. 83a. DOT's interpretation of Section 1305 thus controls the present case.[18]

For these reasons, the decision of the Illinois Supreme Court must be vacated and remanded for reconsideration in light of *Morales*.

II. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT PLENARY REVIEW TO RESOLVE A DIRECT CONFLICT BETWEEN THE ILLINOIS SUPREME COURT AND THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND TO CONSIDER THE IMPORTANT QUESTIONS PRESENTED BY THIS CASE.

If this Court does not vacate and remand for reconsideration in light of *Morales*, plenary review is imperative because the decision of the Illinois Supreme Court conflicts directly with the Seventh Circuit's ruling in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889

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indicated that the Court would defer to exercises of that power. *Morales*, 112 S.Ct. at 2040. DOT has recognized that flexibility in the administration of frequent flyer programs *promotes* competition because frequent flyer programs are a principal "means of competing for passengers." DOT Order at 12; App. 80a.

[18] The DOT Order was issued after the Illinois Supreme Court's decision. This case should thus be remanded for the additional reason of giving the Illinois Supreme Court the benefit of the DOT Order in deciding the issues presented here.

F.2d 751 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990). This direct conflict between courts with concurrent geographic jurisdiction would require immediate action by this Court irrespective of *Morales*.

The Illinois Supreme Court held that claims for damages under the Consumer Fraud Act are not pre-empted by Section 1305 because that Act does not specifically relate to rates, routes, or services. App. 4a. However, in *Illinois Corporate Travel*, the Seventh Circuit (per Easterbrook, J.) held that a damage claim asserted under the same section of the Consumer Fraud Act *was* pre-empted by Section 1305, even though the Act was a law of general applicability. 889 F.2d at 754.

The Illinois Supreme Court also ruled that Section 1305 does not pre-empt any state common law contract claims for damages, because such claims do not specifically relate to rates, routes, or services. App. 4a. In *Illinois Corporate Travel*, however, the Seventh Circuit held that the state common law damage claims for "breach of a contractual duty of good faith and fair dealing" and for "tortious interference with contractual relations" at issue there *were* pre-empted, even though those common law claims did not specifically relate to rates, routes, or services.[19]

Thus, a square conflict presently exists between the Illinois Supreme Court's decision in *Wolens*—damage claims under state statutory and common laws of general applicability can never be pre-empted by Section 1305—and the Seventh Circuit's decision in *Illinois Corporate Travel*—damage claims under state statutory and common laws of general applicability can be pre-empted by Section 1305. This conflict is particularly unseemly be-

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[19] *See Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 682 F. Supp. 378, 379 (N.D. Ill. 1988), expressly pre-empting all of the claims asserted under *state* common law, but granting leave to replead one count to allege violations of the *federal* common law of contract. That decision was affirmed by the Seventh Circuit.

cause identical statutory and common law claims, between identical parties, would not be pre-empted if brought in state court in Illinois, but would be pre-empted if brought in federal court in Illinois.

A conflict of this nature cannot be allowed to stand because it leaves the pre-emptive effect of federal law on actions brought in Illinois in confusion, and encourages blatant forum shopping. The Court's decision in *Morales*, and in particular its citation with approval of Judge Easterbrook's analysis in *Illinois Corporate Travel*, *see Morales*, 112 S.Ct. at 2039, make clear how this conflict should be resolved. But if the Court does not vacate and remand, this ongoing and particularly unseemly conflict between courts of concurrent geographic jurisdiction will continue. Thus, if the Court does not vacate and remand, plenary review must be granted to ensure that this conflict will be resolved promptly.

Should the Court grant certiorari to resolve this conflict, additional questions presented by this case would warrant plenary consideration. The Court should consider, for example, whether the Commerce Clause bars respondents' claims.[20] The application of Illinois law to the myriad transactions at issue in this case—the vast majority of which occurred wholly outside Illinois—would effectively constitute "the projection of one state regulatory regime into the jurisdiction of another State." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 109 S.Ct. 2491, 2499 (1989).[21]

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[20] In addition, the Court should consider whether respondents' claims are implicitly pre-empted because they stand as an obstacle to the federal goals of airline deregulation.

[21] *See also id.* at 2497 ("a state law that has the practical effect of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause"); *Brown-Forman Distillers v. N.Y. Liquor Auth.*, 476 U.S. 573, 586 (1986) (Blackmun, J., concurring) (statute that "operates to affect out-of-state transactions . . . violates the Commerce Clause").

Furthermore, because of the inherently interstate nature of air travel, and of transactions between passengers and airlines, the application of Illinois law sought by respondents presents a real danger that Illinois will dictate a *de facto* national standard for frequent flyer programs. Under the Commerce Clause, establishment of national standards is the prerogative of the federal government, not of the States. It is clear that "a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444 (1960); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945). The application of Illinois law urged by respondents would have precisely that effect: to guard against liability in Illinois, American would have to tailor its frequent flyer practices nationwide to conform to Illinois law. This Court should grant certiorari to establish that the Commerce Clause bars a State from enforcing state laws in a way that would effectively impose a national standard.

CONCLUSION

The petition for certiorari should be granted and the Opinion and Judgment of the Illinois Supreme Court should be vacated and remanded for reconsideration in light of *Morales*. In the alternative, the petition should be granted and the case should be set for plenary review.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF ILLINOIS

Docket No. 71418—Agenda 31—September 1991

MYRON (MIKE) WOLENS *et al.*,
Appellees,

v.

AMERICAN AIRLINES, INC.,
Appellant.

[Filed Mar. 12, 1992]

JUSTICE HEIPLE delivered the opinion of the court:

This issue presented by this appeal stems from an action by plaintiffs against defendant American Airlines concerning benefits accumulated through defendant's frequent flyer program. Following denial of defendant's motion to dismiss, the trial court granted defendant's motion for certification for interlocutory appeal. The appellate court affirmed the order of dismissal. 207 Ill. App. 3d 35.

Plaintiffs are participants in defendant's American Airlines AAdvantage (AAdvantage) frequent flyer program. In 1988 they filed a class action against defendant, alleging that they enrolled in the AAdvantage program pursuant to a national membership campaign by defendant. Once enrolled, plaintiffs received various communications from defendant setting forth the benefits of the program and the mileage credits necessary for

receipt of those benefits. Plaintiffs used defendant's airline, and used the facilities of other organizations that participated in the AAdvantage program, including other airlines, hotels, and car rental companies, in order to accumulate mileage credits for use in the program. According to plaintiffs' complaint, the value of those credits was substantially and adversely affected by defendant, who retroactively reduced and restricted the benefits available, effective May 18, 1988.

Plaintiffs charged that defendant's action in retroactively modifying the rules of the AAdvantage program constituted a breach of defendant's contracts with plaintiffs and all others who joined the program prior to May 1988. The complaint also charged that the defendant's action was in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (Ill. Rev. Stat. 1987, ch. 121½, par. 261 *et seq.*). Plaintiffs sought money damages and an injunction preventing retroactive application of any changes in the program to mileage credits earned prior to the changes.

Defendant initially removed the action to the United States District Court for the Northern District of Illinois, arguing that the suit raised a Federal question exclusively committed to the adjudication of the Federal courts pursuant to section 1305(a)(1) of the Federal Aviation Act (49 U.S.C. § 1305(a)(1) (1988)). The district court remanded the action to the circuit court, concluding that the complaint raised State law contract and fraud claims, and that such claims are not converted into Federal actions by section 1305 or its legislative history. *Wolens v. American Airlines, Inc.* (N.D. Ill., Oct. 25, 1988), No. 88-C-8158.

On remand, defendant moved to dismiss plaintiffs' action and a second similar class action complaint which was filed following the district court decision and consolidated with the original action. Defendant moved to dis-

miss on the ground that plaintiffs' claims relate to defendant's rates and services and therefore are expressly preempted by section 1305 of the Federal Aviation Act. Defendant moved to dismiss plaintiffs' Consumer Fraud Act claims on the ground that they are implicitly preempted by Federal regulation. Finally, defendant moved to dismiss plaintiffs' claims in their entirety on the ground that they are barred by the commerce clause because subjecting airlines to State consumer fraud and common law contract claims would impose a burden on interstate commerce.

The circuit court denied defendant's motion to dismiss on March 20, 1989, finding that section 1305 did not preempt plaintiffs' claims. On March 23, 1989, the circuit court granted defendant's motion for certification of the following question for interlocutory review pursuant to Supreme Court Rule 308 (134 Ill. 2d R. 308):

> "Whether plaintiffs' claims are preempted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301-1557, and by the federal regulations promulgated thereunder, and precluded under the Commerce Clause of the United States Constitution?"

The appellate court answered the question in the negative, and affirmed the decision of the trial court with respect to plaintiffs' breach of contract and Consumer Fraud Act claims, holding that their damage claims are not preempted by section 1305. The court concluded, however, that the attempt to enjoin defendant's application of its new AAdvantage program rules would be an attempt to regulate the services of an airline and thus a violation of section 1305. The appellate court issued a certificate of importance to permit immediate review by this court, and this court assumes jurisdiction pursuant to article VI, section 4(c), of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VI, § 4(c)), and Supreme Court Rule 316 (134 Ill. 2d R. 316). We affirm.

Section 1305(a) provides in part:

> "[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier * * *." (49 U.S.C. § 1305 (a)(1) (1988).)

Plaintiffs request injunctive relief to halt application of defendant's new AAdvantage program rules. As the appellate court correctly concluded, injunctive relief would involve the regulation of defendant's services and therefore violate section 1305. See *Hingson v. Pacific Southwest Airlines* (9th Cir. 1984), 743 F.2d 1408.

Plaintiffs' claims for damages for breach of contract and violation of the Consumer Fraud Act, however, survive. We adopt the prevailing view, set forth in *West v. Northwest Airlines, Inc.* (9th Cir. 1990), 923 F.2d 657, that "section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services." (923 F.2d at 660. See also *Bieneman v. City of Chicago* (7th Cir. 1988), 864 F.2d 463.) The instant claims bear only a tangential relation to defendant's rates and services and are not expressly preempted.

Defendant also contends that plaintiffs' claims are implicitly preempted under section 1302(a)(7) of the Federal Aviation Act, which states that the prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation shall be considered in the public interest and in accordance with the public convenience. Proof of implied preemption requires defendant to demonstrate that Congress intended to occupy the field and give Federal law exclusive authority. (*West v. Northwest Airlines, Inc.*, 923 F.2d at 661.) Nothing in the language of

section 1302(a)(7) indicates an intent to foreclose State damage claims against an airline for engaging in deceptive practices. *New York v. Trans World Airlines* (S.D.N.Y. 1989), 738 F.Supp. 162.

Additionally, section 1506 of the Federal Aviation Act provides:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (49 U.S.C. app. § 1506 (1988).)

This language indicates that Congress did not intend to occupy the field, but rather that common law remedies were intended to survive. (*Bieneman v. City of Chicago*, 864 F.2d at 471; *West v. Northwest Airlines, Inc.*, 923 F.2d at 661.) Plaintiffs' claims are not implicitly preempted.

Finally, defendant argues that plaintiffs' claims are barred by the commerce clause. Injunctive relief, defendant contends, will result in State regulation of interstate commerce. In light of our conclusion that an attempt to enjoin defendant's actions regarding the AAdvantage program would constitute improper State regulation preempted by section 1305, further discussion of defendant's commerce clause argument is unnecessary.

Federal and State courts have repeatedly refused to interpret the Federal Aviation Act so as to preempt all State laws. Courts have carefully and narrowly construed the applicable law so as to preempt only those State laws and regulations that specifically relate to and have more than a tangential connection with an airline's rates, routes or services. These courts have recognized that Congress did not intend section 1305 to be construed as a blanket preemption provision, and we join in this conclusion. While plaintiffs' claims for injunctive relief are expressly

preempted by the language of section 1305, their damage claims for breach of contract and violation of the Consumer Fraud Act survive.

Accordingly, the circuit and appellate court decisions are affirmed.

Judgments affirmed.

JUSTICES CLARK and FREEMAN took no part in the consideration or decision of this case.

CHIEF JUSTICE MILLER, specially concurring:

The majority concludes that section 1305(a)(1) of the Federal Aviation Act (49 U.S.C. § 1305(a)(1) (1988)) does not expressly preempt the plaintiffs' State-law-based claims for damages. As the sole support for this holding, the majority opinion asserts that the Federal statute preempts only State laws that are specifically directed at the airline industry and does not affect laws of general application, like those at issue here. Although I agree with the majority's conclusion, I cannot subscribe to its rationale.

Unlike the majority, I am not persuaded that Federal preemption exclusively turns on a determination of whether the State law at issue is general or specific in its focus and operation. Although State laws specifically addressing activity that is the subject of an express preemption provision will be preempted (see *Mackey v. Lanier Collections Agency & Service, Inc.* (1988), 486 U.S. 825, 829-30, 100 L. Ed. 2d 836, 843-44, 108 S. Ct. 2182, 2185), not every State law having general application is automatically saved from preemption. Indeed, one apparent and unsustainable consequence of the majority's reasoning would be to shield from preemption all common law actions and remedies, which by their nature have general application. The general nature of a State law can be a circumstance arguing against preemption, but that characteristic alone will not be determinative. See *In-*

gersoll-Rand Co. v. McClendon (1990), 498 U.S. ——, ——, 112 L. Ed. 2d 474, 484, 111 S. Ct. 478, 483.

One need not look far to find, in this or other contexts, Federal preemption of State or other local laws having general application. For example, statutes or common law remedies, even though not aimed directly or entirely at airlines, may not be used to control the seating of aircraft passengers. (See *O'Carroll v. American Airlines, Inc.* (5th Cir. 1989), 863 F.2d 11; *Anderson v. USAir, Inc.* (D.C. Cir. 1987), 818 F.2d 49; *Hingson v. Pacific Southwest Airlines* (9th Cir. 1984), 743 F.2d 1408; *Hastalis v. Human Rights Comm'n* (1990), 205 Ill. App. 3d 50.) These cases surely demonstrate that not every law of general application will survive Federal preemption, and thus the majority's proffered distinction between laws of general application and laws of specific application fails to provide a reliable guide for resolving preemption questions. If this distinction is useful at all, it is only because a law's general application supplies a necessary, though not a sufficient, predicate for a finding of no preemption.

Federal preemption of State laws may occur in three ways. First, State law may be expressly preempted, by an explicit Congressional statement to that effect. (*Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 95, 77 L. Ed. 2d 490, 500, 103 S. Ct. 2890, 2899). Second, State law may be implicitly preempted, as when Congress has occupied a field so extensively that any State regulation would be inconsistent with the comprehensive Federal scheme. (*Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152.) Third, State law will be preempted when it actually conflicts with Federal law. A conflict will be found when compliance with both Federal and State provisions is impossible (*Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 257, 83 S. Ct. 1210, 1217), or when the State law stands

as an obstacle to the full accomplishment of the Federal purpose (*Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 85 L. Ed. 581, 587, 61 S. Ct. 399, 404). Determining whether State law is preempted by Federal law is solely a question of Congressional intent. (*California Federal Savings & Loan Association v. Guerra* (1987), 479 U.S. 272, 280, 93 L. Ed. 2d 613, 623, 107 S. Ct. 683, 107 S. Ct. 683, 689.) In this regard, we may consider the presumption against preemption in areas of law traditionally regulated by the States. (*Metropolitan Life Insurance Co. v. Massachusetts* (1985), 471 U.S. 724, 740, 85 L. Ed. 2d 728, 740-41, 105 S. Ct. 2380, 2389; *Federal Express Corp. v. California Public Utilities Comm'n* (9th Cir. 1991), 936 F.2d 1075, 1078; *West v. Northwest Airlines, Inc.* (9th Cir. 1990), 923 F.2d 657, 659.) "But when Congress has 'unmistakably . . . ordained' [citation] that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall." *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 525, 51 L. Ed. 2d 604, 614, 97 S. Ct. 1305, 1309.

The Federal Aviation Act contains an express preemption provision, and the principal question before us is whether the challenged State laws and remedies at issue here fall within its scope. Section 1305(a)(1) of the Act provides, in pertinent part:

> "[N]o State or political subdivision thereof * * * shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier * * *." (49 U.S.C. § 1305(a)(1) (1988).)

As construed by the courts, section 1305(a)(1) does not preempt every State-law-based claim affecting airlines and their operations. See *Air Transport Association of America v. Public Utilities Comm'n* (9th Cir. 1987), 833 F.2d 200, 207; see also *Federal Express Corp. v. California Public Utilities Comm'n* (9th Cir. 1991), 936 F.2d

1075, 1078 ("[D]espite the very broad and apparently all-inclusive language of [section 1305(a)(1)], common sense and common practice have forbidden that the statute be taken literally and have restricted its range").

The preemption provision was enacted as part of the Airline Deregulation Act of 1978 (Pub. L. 95-504, 92 Stat. 1708 (1978)) and later codified as section 1305 of the Federal Aviation Act. In the Airline Deregulation Act, Congress significantly altered the dynamics of the airline industry by substantially reducing, though not completely eliminating, the Federal regulatory apparatus that had previously limited competition among air carriers. It seems clear, then, that a primary purpose of the preemption provision contained in the 1978 amendatory act was to prevent the States from attempting to re-regulate air carriers, by imposing their own potentially conflicting requirements, after Congress had deregulated the airline industry. (*New England Legal Foundation v. Massachusetts Port Authority* (1st Cir. 1989), 883 F.2d 157, 173; Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. Air L. & Com. 747, 755-56 (1979).) This is not to suggest that the range of State activity preempted by section 1305(a)(1) is necessarily coextensive with the regulatory apparatus dismantled in 1978. But Congress, having decided to exit the business of regulating air carriers' rates, routes, and services, surely wanted to forbid the States to attempt to fill that regulatory vacuum, and I would construe the preemption provision in that light.

If the principal objective of section 1305(a)(1) is to bar State economic regulation of air carriers (*Federal Express Corp. v. California Public Utilities Comm'n* (9th Cir. 1991), 936 F.2d 1075, 1078-79), then it must be concluded that the claims raised here fall outside the intended reach of that provision. The plaintiffs allege breach of contract and violations of the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1989, ch.

121½ pars. 261 through 272). By their complaints, the plaintiffs seek to enforce certain State-law-based statutory and common law rights. These claims are not regulatory in force or effect. They do not establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide. The plaintiffs' claims do not threaten the defendant airline with economic regulation, which Congress intended to prevent the States from imposing on a deregulated airline industry. The plaintiffs seek only to enforce their statutory and common law remedies for the defendant airline's alleged breach of its self-imposed obligations. For these reasons, I would conclude that the plaintiffs' damage claims are not expressly preempted by section 1305(a)(1) of the Federal Aviation Act.

One further consideration that counsels against an overly expansive reading of the preemption provision is found in the savings clause of section 1506 of the Federal Aviation Act. Section 1506 provides:

> "Nothing in this chapter shall in any way abridge or alter the reemdies now existing at comon law or by statute, but the provisions of this chapter are in addition to such remedies." (49 U.S.C. § 1506 (1988).)

The savings clause was part of the Federal Aviation Act prior to 1978, and the clause was retained by Congress notwithstanding the adoption of the preemption provision contained in the Airline Deregulation Act. As the majority opinion correctly concludes, the savings clause preserves, against implied preemption, State-law claims that are not specifically preempted by section 1305(a)(1). (*Trans World Airlines, Inc. v. Mattox* (5th Cir. 1990), 897 F.2d 773, 783, *appeal after remand* (1991), 924 F.2d 1055, *cert. granted* (1991), —— U.S. ——, 116 L. Ed. 2d 601, 112 S. Ct. 632; *Illinois Corporate Travel, Inc. v. American Airlines, Inc.* (7th Cir. 1989), 889 F.2d 751, 754.) By retaining the savings clause at the same time it

added the preemption provision. Congress apparently believed that some statutory and common law remedies (see, *e.g.*, *Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978; *Brunswasser v. Trans World Airlines, Inc.* (W.D. Pa. 1982), 541 F. Supp. 1338) would in fact survive the enactment of section 1305(a)(1).

As a final matter, I question the majority's conclusion that the plaintiffs' requests for injunctive relief are preempted even though their claims for money damages are not. The majority applies the same distinction adopted by the appellate court in the present case (207 Ill. App. 3d 35, 39). It is not clear, however, that the two forms of relief are so readily distinguishable for preemption purposes. *See International Paper Co. v. Ouellette* (1987), 479 U.S. 481, 498 n.19, 93 L. Ed. 2d 883, 901 n.19, 107 S. Ct. 805, 815 n.19.) In any event, in the absence of a finding that the plaintiffs properly allege claims for which injunctive relief may be awarded, I believe it is premature to attempt to determine in this interlocutory appeal whether that form of relief would be preempted by Federal law. The question whether the plaintiffs may obtain injunctive relief under the Consumer Fraud and Deceptive Business Practices Act has not been raised in this court and thus is not before us. If, as the appellate court concluded, private actions for injunctive relief are not available under the Act (207 Ill. App. 3d at 39), we would have no occasion to consider in this case the preemptive effect of section 1305(a)(1) on that portion of the plaintiffs' action.

For the reasons stated, I concur in the court's judgment.

APPENDIX B

ILLINOIS APPELLATE COURT
THIRD DIVISION

December 12, 1990

No. 1-89-0918

MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of others similarly situated,
Plaintiffs-Appellees,

v.

AMERICAN AIRLINES, a foreign corporation,
Defendant-Appellant.

P.S. TUCKER, on behalf of herself and all others similarly situated,
Plaintiff-Appellee,

v.

AMERICAN AIRLINES, a foreign corporation,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County
Honorable Arthur L. Dunne, Judge Presiding

JUSTICE WHITE delivered the opinion of the court.

Defendant American Airlines has filed this interlocutory appeal from an order of the circuit court denying

defendant's motion to dismiss plaintiffs' complaints. Defendant contends that plaintiffs' claims are preempted by federal law and barred by the Commerce Clause.

In 1988, plaintiffs Myron Wolens, Albert Gale, R. Craig Zafis, Bret Maxwell, and Robert Nelson filed a class action complaint against defendant in the circuit court of Cook County. The complaint alleged that in 1981 or 1982, defendant created the American Airlines AAdvantage frequent flyer program and solicited public membership in the program through advertisement in the national media and general mailings. Plaintiffs alleged that this solicitation constituted a unilateral contract offer which they accepted when they joined the program sometime prior to 1988.

Plaintiffs alleged that after joining the program and receiving materials from defendant detailing the available benefits and the mileage credits required therefor, they accumulated mileage credits by using the airlines and facilities of defendant and of those participating with defendant, even if other less costly or more convenient services were available. Plaintiffs further alleged that the value of their credits was substantially and adversely affected when, on May 18, 1988, defendant unilaterally instituted a retroactive reduction in the benefits available in exchange for the credits.

Plaintiffs charged that defendant's action in unilaterally and retroactively reducing program benefits constituted a breach of defendant's contracts with plaintiffs and all others who joined the program prior to May 1988. Plaintiffs also charged that defendant's action was in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"). (Ill. Rev. Stat. 1988, ch. 121½, pars. 261 *et seq.*) Plaintiffs sought monetary damages and an injunction preventing retroactive application of any changes in the program to mileage credits earned prior to such changes.

Defendant removed the action to the United States District Court for the Northern District of Illinois on the ground that the complaint raised a federal question exclusively committed to adjudication in the federal courts by section 105(a)(1) of the Federal Aviation Act. (49 U.S.C. § 1305(a)(1).) The district court remanded the action to the circuit court finding that plaintiffs' complaint was grounded in state law and that nothing in section 1305 or its legislative history indicated a congressional intent to convert plaintiffs' state contract and fraud claims into federal actions removable to federal court. *Wolens v. American Airlines, Inc.*, No. 88-C-8158 (N.D.Ill., Oct. 25, 1988).

Subsequent to the district court's order remanding the action to the circuit court, a second class action complaint was filed against defendant by P. S. Tucker. The second complaint, like the first, alleged that defendant's action in retroactively modifying the rules of the frequent flyer program constituted a breach of contract and violated the Consumer Fraud Act.

The two actions were consolidated and defendant moved to dismiss both contending that the causes of actions were expressly preempted by section 1305(a). Defendant also argued that plaintiffs' actions were barred by the Commerce Clause because subjecting airlines to state consumer fraud and common law contract claims would impose a burden on interstate commerce.

On March 20, 1989, the circuit court entered a memorandum opinion and order denying defendant's motion to dismiss. The court found that section 1305 did not preempt plaintiffs' claims and that nothing in the record indicated that prosecution of plaintiffs' claims would burden interstate commerce.

On March 23, the court granted defendant's motion for certification of a question for interlocutory appeal. The question certified for appeal was: "Whether plain-

tiffs' claims are preempted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301-1557, and by the federal regulations promulgated thereunder, and precluded under the Commerce Clause of the United States Constitution?" We conclude that this question must be answered in the negative.

OPINION

The United States Supreme Court acknowledged in *Wardair Canada v. Florida Department of Revenue* (1986), 477 U.S. 1, 106 S.Ct. 2369, 91 L.Ed. 2d 1, that Congress had regulated aviation extensively. However, the Court also pointed out that State law is not preempted whenever there is any federal regulation of an activity or industry. 477 U.S. at 6.

There are three instances where federal law will be found to preempt State law: (1) where Congress has expressly preempted state law; (2) where congressional intent to preempt may be inferred from the pervasiveness of the federal regulatory scheme; and (3) when state law conflicts with federal law or interferes with the achievement of congressional objectives. (*West v. Northwest Airlines, Inc.*, No. 89-35820 (9th Cir. September 11, 1990; *O'Carroll v. American Airlines, Inc.* (5th Cir. 1989), 863 F.2d 11.) In the case before us, defendant contends that plaintiffs' claims are expressly preempted by section 1305. Defendant also contends that section 1305 and its legislative history demonstrate a Congressional intent to occupy the entire field and exercise exclusive federal control over aviation matters. Finally, defendant argues that the Commerce Clause bars plaintiffs' claims.

I. Express Preemption

Section 1305(a) provides that:

> "[N]o State or political subdivision thereof and no interstate agency or other political agency of two

> or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier * * *."

Defendant argues that all of plaintiffs' claims are directly related to defendant's rates or services and, therefore, are preempted.

Plaintiffs' breach of contract and Consumer Fraud Act claims seek to recover damages for the loss in value of their mileage credits. Plaintiffs also request orders enjoining defendant from applying any subsequent changes in the frequent flyer program to plaintiffs.

Initially we note that private actions for injunctive relief may not be maintained under the Consumer Fraud Act. (*Martin v. Eggert* (1988), 174 Ill. App. 3d 71, 528 N.E.2d 386.) In addition, we find that any attempt to enjoin defendant's application of its new program rules would be an attempt to regulate the services of an airline and thus a violation of section 1305. See *Hingson v. Pacific Southwest Airlines* (9th Cir. 1984), 743 F.2d 1408; *Anderson v. USAir, Inc.* (D.C.D.C. 1985), 619 F.Supp. 1191, aff'd 818 F.Supp. 49.

However, we also find that plaintiffs' claims for damages for breach of contract and violation of the Consumer Fraud Act are not preempted by section 1305. See *Beineman v. Chicago* (7th Cir. 1988), 864 F.2d 463; *Hingson v. Pacific Southwest Airlines; In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975* (2nd Cir. 1980), 635 F.2d 67; *Wolst v. American Airlines, Inc.* (N.D.Ill. 1987), 668 F.Supp. 1117; *Anderson v. USAir, Inc.; Brunwasser v. Trans World Airlines, Inc.* (W.D.Pa. 1982), 541 F.Supp. 1338.

In *Anderson* and *Hingson*, blind plaintiffs brought suit alleging that the defendant airlines' policy of excluding blind persons from occupying certain seats on aircraft violated local laws providing equal access for and pre-

cluding discrimination against the handicapped. The court of appeals in *Hingson* and the federal district court in *Anderson* both held that the state laws in question were preempted by section 1305. The courts stated that the term "services" as used in section 1305 included the regulation of air carrier seating policies for handicapped persons. *Hingson*, 743 F.2d at 1415-16; *Anderson*, 619 F.Supp. at 1198.

However, the courts in *Hingson* and *Anderson* also found that the blind plaintiffs' common law claims for damages for intentional infliction of emotional distress were not preempted by section 1305. (*Hingson*, 743 F.2d at 1416; *Anderson*, 619 F.Supp. at 1197.) Several other courts have also concluded that common law actions for damages are not preempted by section 1305. See *West v. Northwest Airlines, Inc.; Bieneman v. Chicago*, 864 F.2d at 471; *In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 635 F.2d at 74; *Holliday v. Bell Helicopters Textron, Inc.*, No. 88-00904 (D.Hawaii, Oct. 12, 1990); *New York v. Trans World Airlines, Inc.* (S.D.N.Y. 1989), 728 F.Supp. 162; *Illinois Corporate Travel, Inc. v. American Airlines, Inc.* (N.D.Ill. 1988), 682 F.Supp. 378, 380 n.1, aff'd 889 F.2d 752; *Wolst v. American Airlines, Inc.* (N.D.Ill. 1987), 668 F.Supp. at 1119; *Brunwasser v. Trans World Airlines, Inc.* (W.D.Penn. 1982), 541 F.Supp. at 1345; *Stream Aviation, Inc. v. Anders Production, Inc.* (La. 1987), 517 So.2d 1157; *People v. Western Airlines, Inc.* (1984), 155 Cal.App.3d 597.

We are aware that some courts have reached an opposite conclusion. (See *Mattox v. Trans World Airlines, Inc.* (5th Cir. 1990), 897 F.2d 773; and *O'Carroll v. American Airlines, Inc.*, both holding that common law claims against an airline were preempted by section 1305.) However, we believe that the better reasoned view is that expressed in *West v. Northwest Airlines, Inc.* There, the ninth circuit court of appeals stated:

> "*We disagree with Northwest and the district court that 'law[s] . . . relating to airline services' encompasses all state laws that affect airline services, however tangentially.* This interpretation of § 1305(a)(1) would unduly expand preemption and ignore our presumption against federal preemption in this traditional state law area. Instead, we find that Section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving air services. Thus, *state laws that merely have an effect on airline services are not preempted* (emphasis added)."

The claims for damages in the present case arise out of plaintiffs' contracts with defendant. The claims bear only a tangential relation to defendant's rates and services and any effect that an award of damages would have on defendant's rates and services would be remote and indirect. (*New York v. Trans World Airlines, Inc.*, 728 F.Supp. at 176; and see *Nader v. Allegheny Airlines* (1976), 426 U.S. 290, 300, 96 S.Ct. 1978, 48 L.Ed.2d 643 (holding that any impact on rates that may result from the imposition of common law tort liability or from practices adopted by a carrier to avoid such liability would be incidental); and *Beineman v. Chicago*, 864 F.2d at 471 (pointing out that State courts award damages every day in air crash cases notwithstanding the fact the federal law preempts State regulation of safety in air travel).) Accordingly, we conclude that section 1305 does not expressly preempt plaintiffs' actions for damages for breach of contract and violation of the Consumer Fraud Act.

II. Implied Preemption

Defendant argues that the extensive regulation of the field of aviation by Congress and the Department of Transportation demonstrate congressional intent to oc-

cupy the entire field. Defendant bases its argument on sections 102(a)(7) and 411 of the Federal Aviation Act (49 U.S.C. §§ 1302(a)(7), 1381) and the provisions of the Civil Aeronautics Board Sunset Act of 1984 ("Sunset Act") (P.L. No. 98-443, 98 Stat. 1703). Defendant argues that these authorities establish that Congress intended that the Department of Transportation have exclusive authority for regulating advertising and preventing deceptive practices by airlines. We disagree.

Section 1302(a)(7) states only that the prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation shall be considered in the public interest and in accordance with the public convenience. Nothing in its language gives rise to an inference that section 1302(a)(7) was intended to foreclose State damage actions against an airline for engaging in deceptive practices. See *New York v. Trans World Airlines*, 728 F.Supp. at 177.

Turning to defendant's argument that section 1381 indicates a congressional intent to preclude State consumer protection claims, we note that a similar argument was rejected by the Supreme Court in *Nader v. Allegheny Airlines*. There, the Court held that section 1381 did not eliminate state court common law or statutory claims against airlines for fraud; rather, the Court ruled that such claims were preserved by section 1106 of the Federal Aviation Act (49 U.S.C. § 1506). *Nader*, 426 U.S. at 300.

Section 1506 provides that:

> "Nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

The Supreme Court found that section 1381 was intended, not to preclude, but to supplement the compensatory common law remedies for private parties preserved under section 1506. *Nader*, 426 U.S. at 300-1.

Defendant contends that the *Nader* decision cannot be considered as controlling because the decision predated the Sunset Act of 1984. Defendant argues that a statement in the legislative history of the Sunset Act, that the Act preempts State regulation of consumer protection and unfair competitive practices, indicates that Congress intended to preempt plaintiffs' claims.[1]

As our earlier discussion points out, an award of damages for breach of contract or violation of the Consumer Fraud Act does not amount to "State regulation." Further, Congress in passing the Sunset Act in 1984, is presumed to have been aware of the Supreme Court's 1976 holding in *Nader* that section 1506 preserved State common law claims for fraud. Thus, Congress's retention of section 1506 following passage of the Sunset Act, indicates its tacit approval of the Supreme Court's decision. Accordingly, we find that Congress did not intend the Sunset Act to preempt plaintiffs' state law damage claims.

III. Commerce Clause

Defendant argues that the circuit court erred in holding that the Commerce Clause did not bar plaintiffs' claims. Defendant contends that by seeking an injunction in an Illinois court that will require defendant to provide specific services to its frequent flyer program members nationwide, plaintiffs are attempting to regulate interstate commerce.

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[1] The statements defendant relies on are contained in House Report 793 (H.R. No. 793, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2857, 2858.) The House Report provides that:

> "In addition, to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines."

In our discussion above, we pointed out that plaintiffs could not maintain a private action for injunctive relief under the Consumer Fraud Act and that any attempt to enjoin defendant's action would constitute improper State regulation of the activities of an airline. In light of the foregoing, defendant's arguments that an injunction would violate the Commerce Clause are moot.

In conclusion, we find that although plaintiffs' claims for injunctive relief are expressly preempted by section 1305, plaintiffs' common law and statutory damage claims are neither expressly or implicitly preempted. Accordingly, the order of the circuit court denying defendant's motion to dismiss is affirmed.

AFFIRMED.

RIZZI and FREEMAN,* JJ., concurring.

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* JUSTICE FREEMAN concurred in this opinion prior to his election to the Illinois Supreme Court.

APPENDIX C

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

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88 CH 7554

consolidated with: 89 CH 119

JUDGE ARTHUR L. DUNNE, Presiding

MYRON (MIKE) WOLENS, *et al.*,
Plaintiff,

v.

AMERICAN AIRLINES, INC.,
Defendant.

P.S. TUCKER,
Plaintiff,

v.

AMERICAN AIRLINES,
Defendant.

MEMORANDUM OPINION AND ORDER

[Entered Mar. 20, 1989]

The complaints in these consolidated cases in sum allege that changes in American Airline's ("AA") frequent flyer program, "AAdvantage", constitute a breach of contract. The plaintiffs seek damages and injunctive relief on behalf of themselves individually and on behalf of others similarly situated pursuant to the Illinois Con-

sumer Fraud and Deceptive Business Practice Act, Ill. REV.STAT. ch. 121½, para. 261-272 (1987).

In both cases AA has filed identical motions to dismiss. Consequently, this opinion and order applies to both cases. AA's motions to dismiss contend in summary that these complaints are preempted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1301-1557, its accompanying federal regulations and by the Commerce Clause of the United States Constitution. Specifically, AA contends that 49 U.S.C. sec. 1305(a) expressly preempts any statutory or common law cause of action which would afford plaintiff relief and that Congress intended to remove the states from any regulation of airlines. In addition, the defendant argues that the Commerce Clause bars this action because to subject airlines to the state consumer fraud and contract law would impose a burden which materially affects interstate commerce in an area previously regulated by federal law. United States Constitution, Article I, section 8, cl. 3.

In response, the plaintiffs argue that 49 U.S.C. sec. 1506 allows these state causes of action and that the AA's reading of sec. 1305 is unduly expansive, i.e., this action is not a regulation of "rates, routes or services." Moreover, Congress did not intend to preempt all state remedies. The Commerce Clause does not bar prosecution of these actions.

I.

These motions raise a question of statutory interpretation. What is the affect of the apparent conflict between 49 U.S.C. sec. 1305(a) and sec. 1506? Sec. 1506, enacted August 23, 1958, reads as follows: "Nothing in this chapter (same chapter as section 1305) shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." As far as this court can determine, sec. 1506 has not been explicitly repealed by

any subsequent act of Congress. However, in 1978, Congress enacted the Airline Deregulation Act, Pub. L. No. 95-505, 92 Stat. 1705. As part thereof, Congress enacted 49 U.S.C. sec. 1305(a)(1) which reads in part: ". . . no state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or service of any air carrier. . ."

Sec. 1506 makes the general statement that the remedies of the Federal Aviation Act are not exclusive. Sec. 1305 apparently contradicts that by preempting state regulation. However, on closer reading, sec. 1305 preempts only those state enactments or the enforcement of state laws which "relate to rates, routes and other services." Sec. 1506 is a general rule. Sec 1305 is a specific exception to the general rule. Reading sec. 1506 and section 1305 together it appears that state remedies are available except to the extent that those laws relate to rates, routes, or services. The issue is whether the plaintiff's enforcement of the Illinois consumer fraud claim and common law contract claim relate to rates or services.

This court can find no reported case, state or federal, which has decided this issue. However, AA cites *Rivkin v. Northwest Airlines*, No. 88 CH 2637 (Circuit Court of Cook County, Dec. 8, 1988, as amended Dec. 15, 1988). As of this date, a motion to reconsider the interlocutory *Rivkin* decision pends. There is no collateral estoppel effect by *Rivkin*. *Colbe v. Chicago Health Club, Inc.* 53 Ill.App.3d 1019 (1st Dist. 1977). The analysis of *Rivkin* is persuasive at best. However, this court is unpersuaded. In *Rivkin*, Judge Hall determined that the Northwest frequent flyer program related to rates because an affidavit of Northwest Airlines stated that the cost of the frequent flyer program was factored into the determination of rates. There is no such affidavit in the instant case. Even assuming arguendo the existence of such affidavit, this Court rejects the *Rivkin* reasoning. Such

an interpretation would have the exception swallow the rule. This court will not apply such a broad reading of "relating to rates, routes or services." Assuming AA passed on the cost of the frequent flyer program, it would be ludicrous to propose that anything which might contribute to a determination of fare becomes the subject of preemption. Surely airlines take into account the cost of tort claims when fixing rates, yet no one would dispute the state court's jurisdiction to hear tort cases filed against an airline. *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988). To preempt enforcement of the consumer fraud act or a common law contract would afford AA an "impenetrable immunity" from enforcement of its contracts. See *Owen v. City of Atlanta*, 157 Ga. App. 354, 277 S.E.2d 338 (1981), *aff'd* 248 Ga. 299, 282 S.E.2d 906, *cert. denied*, 456 U.S. 972, 72 L. Ed.2d 846, 102 S.Ct. 2285 (1982).

II.

AA argues that Congress transferred consumer related responsibilities from the Civil Aeronautics Board to the Department of Transportation ("DOT") citing 49 U.S.C. sec. 1302(a)(7), sec. 1381(a) and that DOT has exclusive power over consumer matters. This court finds no statutory authority for that argument. Sec. 1302(a)(7) says that the Board shall consider the prevention of unfair, deceptive, predatory or anticompetitive practices in air transportation. This is hardly the type of regulation that would give rise to implicit preemption. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). Sec. 1506 specifically states that the remedies in (this act) are not exclusive. The Illinois Consumer Fraud Act is a remedy that is not excluded under Sec. 1506.

III.

Finally, AA argues that prosecution of the plaintiffs' consumer fraud and contract actions constitute state regulations which materially affect interstate commerce

in a regulated area in violation of the Commerce Clause. AA's attempt to remove this case to the federal court was unsuccessful. *Wolens v. American Airlines*, No. 88 C 8158 (N.D. Ill. Oct. 24, 1988) Judge Nordberg Presiding. This court finds no evidence in the record of any effect on interstate commerce. AA has submitted no affidavit in support of that proposition. In light of *Pike v. Brace Church, Inc.*, 397 U.S. 137 (1970) and the lack of evidence of a burden on interstate commerce the court finds that prosecution of these actions is not precluded by the Commerce Clause of the United States.

CONCLUSION AND ORDER

The defendant's motions to dismiss are denied for the above stated reasons.

IT IS HEREBY ORDERED that the defendant shall have 10 days to answer or otherwise plead to the consolidated complaints. Following this court's hearing in the pending 2-615 [*illegible*] motion.

/s/ Arthur L. Dunne
JUDGE ARTHUR L. DUNNE

DATE: March 20, 1989

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

88 CH 7554

consolidated with: 89 CH 119

JUDGE ARTHUR L. DUNNE, Presiding

MYRON (MIKE) WOLENS, *et al.*,
Plaintiff,

v.

AMERICAN AIRLINES, INC.,
Defendant.

P.S. TUCKER,
Plaintiff,

v.

AMERICAN AIRLINES,
Defendant.

ORDER

[Entered Mar. 21, 1989]

THIS CAUSE COMING ON TO BE HEARD on Defendant's Motion to Dismiss the Complaints, as consolidated, pursuant to Sec. 2-619 of the Illinois Code of Civil Procedure, the Court having heard arguments of counsel and having examined Memoranda of Law and otherwise being fully advised in the premises;

IT IS HEREBY ORDERED

1. Defendant's Motions to Dismiss pursuant to Sec. 2-619 of the Illinois Code of Civil Procedure are denied for

the reasons set forth in the Court's Memorandum Opinion and Order.

2. Plaintiffs shall have leave to file a brief in opposition to Defendant's 2-615 Motion to Strike, limited to 12 pages, within 14 days hereof.

3. Defendant shall have leave to file a Reply brief, limited to 12 pages, within 14 days thereafter.

4. Hearing on Defendant's 2-615 Motion to Strike is set for May 2, 1989, at 11:00 a.m., without further notice.

5. Defendant shall file an answer to the Complaint within 10 days thereafter, on or before May 12, 1989.

Atty No. 90513

Name Gilbert W. Gordon

MARKS, MARKS AND KAPLAN, LTD.
Attorney for Plaintiffs

Address 30 N. LaSalle St., #3040

City Chicago, IL 60602

Telephone (312) 332-5200

ENTER:

/s/ Arthur L. Dunne
Judge

APPENDIX D

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 88CH7554

MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

AMERICAN AIRLINES, INC., a foreign corporation,
Defendant.

JURY DEMANDED ON ALL ISSUES AT LAW

CLASS ACTION COMPLAINT
FOR INJUNCTIVE AND OTHER RELIEF

NOW COME the Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of a class of persons similarly situated, and complaining of the Defendant, AMERICAN AIRLINES, INC., a foreign corporation ("AMERICAN"), state as follows:

COUNT I

(IN CHANCERY)

THE CLASS ACTION

1. Defendant operates a domestic and international airline which is authorized to do and does business in the County of Cook and State of Illinois. As a marketing

device for the purpose of encouraging greater use of its airline facilities by the general public, and more particularly, by frequent airline travelers, it created in 1981 or 1982 a program known as the American AAdvantage Program ("PROGRAM"). Other companies such as other airlines, hotels, and car rental companies, also participated with Defendant in the Program. AMERICAN, in consideration for use of its airline and/or the services or facilities of other participants with Defendant in the Program, awarded mileage credits which the traveler was both permitted and induced to accumulate and exchange for a variety of travel and other benefits, the greater the number of mileage credits earned and accumulated, the greater the available benefits for which they could be exchanged.

2. Defendant solicited use of its airline by the general public and, more particularly, by frequent travelers, by featuring its Program in diverse national media and by general mailings and distribution of promotional materials which included applications for membership in the Program, a list of benefits and facilities available, and a delineation of the mileage credits required to obtain the specifically listed benefits. To persons who joined the Program, Defendant sent further explanatory materials detailing the available benefits and the mileage credits required therefor. The greater the number of mileage credits a member accumulated, the greater the benefits he was entitled to receive.

3. Prior to May 18, 1988, each of the named Plaintiffs accepted Defendant's offer, joined the Program, used Defendant's airline, even if more costly or less convenient than others, and/or used the services and facilities of others participating with Defendant in the Program, and received and accumulated mileage credits for the miles so traveled and services and facilties so used.

4. The class which the named Plaintiffs represent consists of persons of the United States who, like the named

Plaintiffs, also joined the Program prior to May 18, 1988, traveled upon Defendant's airline and/or used the services and facilities of other participants in the Program and, as of May 18, 1988, accumulated mileage credits which they still retain. The value of those credits was substantially and adversely affected by Defendant who, effective May 18, 1988, retroactively reduced the benefits theretofore available for said credits, by instituting capacity control restrictions which significantly limit the number of seats available for passengers that wish to pay for travel with Program travel awards.

5. The class of persons affected by the foregoing is so numerous, consisting of millions of persons, that joinder of all members of said class is impracticable.

6. There are questions of both fact and law common to the class, which common questions predominate over any questions affecting only individual members of the class, to wit: each and every class member as did each named Plaintiff, prior to May 18, 1988, by accepting Defendant's aforesaid offer, becoming members of the Program and traveling upon the Defendant airline and/or using the services of other participants in the Program for which they were entitled to mileage credits, accumulated substantial mileage credits which they still retain but the value of which credits, just as was the value of the mileage credits held by the named Plaintiffs, was substantial and adversely effected by Defendant's aforedescribed conduct. Whether such conduct of the Defendant was a breach of contract and/or a violation of the Illinois Consumer Fraud and Deceptive Business Practice Act (Ill. Anno. Stats. Ch. 121½ Section 261, *et seq.*) is common to the rights of all members of the class.

7. The named Plaintiffs and their attorneys will fairly and adequately protect the interests of the class in that the named Plaintiffs like all other members of the class had substantial mileage credits in the Program accumulated prior to May 18, 1988, which were adversely effected

by Defendant's aforesaid action in a like manner, though not necessarily to the same extent, as all other members of the class.

8. A class action is the most fair, just and efficient manner in which to adjudicate the claims arising out of the aforesaid conduct of the Defendant. Should individual actions be brought, or be required to be brought by each individual Plaintiff, a multiplicity of lawsuits would result and cause undue hardship and expense for the Court and the litigants.

9. The prosecution of separate actions by individual members of the Plaintiff class would also create a risk of inconsistent or varying adjudications and rulings with respect to individual members of the class. Additionally, the prosecution of separate actions against the Defendant would create a risk of rulings which might be dispositive of the interests of other class members not parties to the adjudications or substantially impede their ability to protect their interests.

STATEMENT OF CLAIM

10. Defendant's aforesaid solicitation constituted a unilateral offer by Defendant to each named Plaintiff and class member which each said Plaintiff and class member prior to May 18, 1988, accepted by joining the Program, traveling on the Defendant's airline and/or using the facilities and services of other participants in the Program, and thereby, earned mileage credits under the Program which the Defendant, by increasing the available benefits as the accumulated mileage increased, induced them to retain, increase and accumulate.

11. As such mileage credits were earned and accumulated by each named Plaintiff and class member, each said Plaintiff and class member accrued a contractual right to receive from Defendant and Defendant became contractually obligated to furnish to each such Plaintiff and class

member, the benefits to which said mileage credits were entitled under the Program in effect when the mileage credits were earned, accrued and accumulated. Defendant could not alter program benefits retroactively as to mileage credits which had theretofore been earned and accumulated under the Program.

12. As heretofore detailed, each of the named Plaintiffs and the class they represent were members of the Program who, prior to May 18, 1988, did, in the manner aforedescribed, earn and accumulate substantial mileage credits which they still retain.

13. Prior to May 18, 1988, each named Plaintiff and the members of the class were entitled to redeem their American AAdvantage award certificates for free air travel on any available date to applicable destinations for any available seat in the class of service provided (i.e., first class, coach or economy class).

14. Effective May 18, 1988, Defendant unilaterally altered the benefits available to participants in the Program by instituting capacity control restrictions wherein the Defendant restricted or otherwise limited the opportunity of Program members to redeem their award levels for travel or other benefits offered in the Program and/or limited the opportunity of Program members to earn mileage sufficient for specific award levels. Defendant's implementation of capacity control restrictions included both blackout dates, during which no free flights were available, and the limitation of the maximum number of seats allocated to persons wishing to pay for flights with free travel awards.

15. Defendant's unilateral reduction of the value of benefits for mileage credits earned prior to May 18, 1988, and which each traveler was induced by Defendant as aforedescribed to increase, retain and accumulate was in breach of the contract between the Defendant, on the one hand, and, on the other hand, the named Plaintiffs

and the class members who accepted Defendant's offer by traveling upon Defendant's airline, even if it were more costly and less convenient than other airlines, and/or by using the services of others who participated with Defendant in the Program, and thereby earning and accumulating mileage credits under the Program prior to May 18, 1988, for which they were entitled to the benefits available for such mileage credits prior to May 18, 1988.

16. Unless this Court assumes equitable jurisdiction and otherwise so orders, the Defendant will not only impose capacity control restrictions as to the benefits offered under the Program applicable retroactively to mileage credits earned, accumulated and accrued by each of the named Plaintiffs and members of the class prior to May 18, 1988, but will continue to adopt additional changes which it will similarly retroactively apply and thereby require additional litigation.

WHEREFORE, Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of the class of persons similarly situated, respectively pray this Honorable Court:

A. To certify this claim as a class action in order that the named Plaintiffs and their attorneys may represent the class of persons similarly situated;

B. For judgment against the Defendant for damages in the amount that the value of the mileage credits earned and accumulated by the named Plaintiffs and the members of the class prior to May 18, 1988, which they still retain was reduced by reason of the acts of the Defendant aforedescribed, together with punitive damages in such sum as shall be deemed fit;

C. A preliminary and permanent injunction enjoining the Defendant from applying any subsequent changes in the Program Defendant may hereafter make which reduce the benefits available under the Program, to the mileage credits earned, accumulated and accrued prior to any such subsequent changes made by the Defendant;

D. For an award of costs and reasonable attorney's fees incurred for and on behalf of the named Plaintiffs and members of the class in connection with the prosecution of this cause; and

E. For such other and further relief as this Court may deem fit to grant in fashioning a remedy for the named Plaintiffs and the class they represent.

COUNT II

(AT LAW)

CLASS ACTION

1-9. Paragraphs 1 through 9, inclusive, of Count I are hereby re-alleged as Paragraphs 1 through 9, inclusive, of this Count II hereof as though set out in full in said Count II.

STATEMENT OF CLAIM

10-15. Paragraphs 10 through 15, inclusive, of Count I are hereby re-alleged as Paragraphs 10 through 15, inclusive, of this Count II hereof as though set out in full in said Count II.

WHEREFORE, Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of the class of persons similarly situated, respectively pray the Honorable Court:

A. To determine the class and thereupon certify this claim as a class action in order that the named

Plaintiffs and their attorneys may represent the class of persons similarly situated.

B. For judgment against the Defendant for damages in the amount that the value of the mileage credits earned and accumulated by the named Plaintiffs and the members of the class prior to May 18, 1988, which they still retain was reduced by reason of the acts of the Defendant aforedescribed, together with punitive damages in such sum as shall be deemed fit.

C. For an award against the Defendants for costs and reasonable attorney's fees incurred for and on behalf of the named Plaintiffs and members of the class in connection with the prosecution of this cause.

D. For such other and further relief as this Court may deem fit to grant in fashioning a remedy for the named Plaintiffs and the class they represent.

COUNT III

(IN CHANCERY)

CLASS ACTION

1-9. Paragraphs 1 through 9 inclusive of this Complaint entitled "Class Action" are hereby re-alleged as Paragraphs 1 through 9 inclusive of this Count II hereof as though set out in full in said Count II.

STATEMENT OF CLAIM

10. The named Plaintiffs and each class member prior to May 18, 1988, were led to believe by Defendant's aforesaid solicitations that each, by joining the Program, using the Defendant airline and/or the services and facilities of other participants in the Program, would earn mileage credits which, if accumulated, would entitle each to receive in exchange therefor certificates for free air

travel to applicable destinations for any available date for any available seat in the class of service provided. Defendant, by making greater benefits available for the accumulation of greater mileage credits, induced the said named Plaintiffs and members of the class to increase, hold and accumulate their mileage credits.

11. Accordingly, and in reliance upon the said solicitations, each named Plaintiff and class member, prior to May 18, 1988, joined the Program, traveled on the Defendant's airline and/or used the facilities and services of other participants in the Program and thereby earned mileage credits under the Program, which they accumulated so as to obtain the greater benefits offered therefor. The named Plaintiffs and some class members still retain all of their credits so earned and accumulated.

12-13. Paragraphs 13 and 14 of Count I of this Complaint are hereby re-alleged as Paragraphs 12 and 13 of this Count III hereof as though set out in full in said Count III.

14. During the year 1988, in particular, the Defendant induced each named Plaintiff and class members to fly even more frequently on the Defendant airline by offering "Triple Mileage" for each actual mile flown. Defendant offered "Triple Mileage" even though they knew that they would institute capacity control restrictions which would limit the number of seats available and therefore dilute the value of the mileage credits accumulated.

15. At no time either in its aforesaid solicitations or otherwise, while inducing the named Plaintiffs and the members of the class to earn and, more particularly, to accumulate mileage credits and while said mileage credits were, in fact, being earned and accumulated, did Defendant ever advise the said Plaintiffs and members of the class that Defendant believed that it reserved the right and would whenever it determined that it was in its benefit so to do, retroactively restrict, suspend or otherwise alter or reduce the benefits available under the

Program for mileage credits theretofore earned, accumulated and accrued thereunder, by the implementation of capacity control restrictions or otherwise.

16. As a direct and proximate result of Defendant's aforesaid acts, the mileage credits earned, accumulated and still retained by each named Plaintiff and member of the class prior to May 18, 1988, were substantially reduced in value as were those of members of the class who earned mileage credits prior to May 18, 1988.

17. At all times material to this Complaint, there was in full force and effect, as Sections 261, *et seq.* of Chapter 121½ of the Illinois Annotated Statutes, an Act entitled: "The Consumer Fraud and Deceptive Business Practice Act."

18. The aforesaid wrongful acts and omissions of the Defendant constituted violations of the said Act by which each named Plaintiff and other member of the class suffered damages as aforedescribed.

19. Section 10 of the Act authorizes any person who suffers damages as a result of a violation of the Act to bring an action against any other person who committed the act for such relief as the Court deems fit, including reasonable attorney's fees and costs.

20. Each named Plaintiff, member of the class and the Defendant is a "person" as defined by said Act.

21. Paragraph 16 of Count I of this Complaint is realleged as Paragraph 20 [sic] of this Count III hereof as though set out in full in said Count III.

WHEREFORE, Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of the class of persons similarly situated, respectively pray this Honorable Court:

A. To determine the class and thereupon certify this claim as a class action in order that the named

Plaintiffs and their attorneys may represent the class of persons similarly situated.

B. For judgment against the Defendant for damages in the amount that the value of the mileage credits earned and accumulated by the named Plaintiffs and the members of the class prior to May 18, 1988, was reduced by reason of the acts of the Defendant aforedescribed, together with punitive damages in such sum as shall be deemed fit.

C. A preliminary and permanent injunction enjoining the Defendant from applying any subsequent changes in the Program Defendant may hereafter make which reduce the benefits available under the Program, to the mileage credits earned, accumulated and accrued prior to any such subsequent changes made by the Defendant, including any limitation of seats of imposition of blackout periods of time.

D. For an award against the Defendants for costs and reasonable attorney's fees incurred for and on behalf of the named Plaintiffs and members of the class in connection with the prosecution of this cause.

E. For such other and further relief as this Court may deem fit to grant in fashioning a remedy for the named Plaintiff and the class they represent.

COUNT IV

(AT LAW)

CLASS ACTION

1-9. Paragraphs 1 through 9, inclusive, of Count III of this Complaint are re-alleged as Paragraphs 1 through 9, inclusive, of this Count IV as though set out in full in said Count IV.

STATEMENT OF CLAIM

10-16. Paragraphs 10 through 16, inclusive, of Count III of this Complaint are re-alleged as Paragraphs 10 through 16, inclusive, of this Count IV as though set out in full in said Count IV.

17-21. Paragraphs 17 through 21, inclusive, of Count III of this Complaint are re-alleged as Paragraphs 17 through 21, inclusive, of this Count IV as though set out in full said in Count IV.

WHEREFORE, Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of the class of persons similarly situated, respectively pray this Honorable Court:

A. To determine the class and thereupon certify this claim as a class action in order that the named Plaintiffs and their attorneys may represent the class of persons similarly situated.

B. For judgment against the Defendant for damages in the amount that the value of the mileage credits earned and accumulated by the named Plaintiffs and the members of the class prior to May 18, 1988, was reduced by reason of the acts of the Defendant aforedescribed, together with punitive damages in such sum as shall be deemed fit.

C. For an award against the Defendants for costs and reasonable attorney's fees incurred for and on behalf of the named Plaintiffs and members of the class in connection with the prosecution of this cause.

D. For such other further relief as this Court may deem fit to grant in fashioning a remedy for the named Plaintiff and the class they represent.

MYRON (MIKE) WOLENS, ALBERT J. GAYLE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of all others similarly situated,

By: /s/ [Illegible]
One of their Attorneys

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APPENDIX E

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 89 CH 119

P. S. TUCKER, on behalf of herself and all others similarly situated,

Plaintiff,

v.

AMERICAN AIRLINES, INC.,
a foreign corporation,

Defendant.

JURY TRIAL DEMANDED ON ALL ISSUES AT LAW

CLASS ACTION

CLASS ACTION COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Now comes the Plaintiff, P. S. Tucker, on behalf of herself and all others similarly situated, complaining against defendant American Airlines, Inc. ("American"), a foreign corporation, as follows:

COUNT I

(IN CHANCERY)

THE CLASS ACTION

1. Defendant operates a domestic and international airline which is authorized to do and does business in the

County of Cook and the State of Illinois. As a marketing device for the purpose of encouraging greater use of its airline facilities by the general public and, more particularly, by frequent airline travelers, defendant created more than 5 years ago a program entitled the "AAdvantage" frequent flyer program ("Program"). Other companies also participated with defendant in the Program, including other airlines, hotel and rental car companies.

2. In consideration for use of defendant's airline and/or the services or facilities of other participants with defendant in the Program, defendant awarded mileage credits which the traveler was both permitted and induced to accumulate and exchange for a variety of travel and other benefits. The greater the number of mileage credits earned and accumulated, the greater the available benefits for which they could be exchanged.

3. Defendant solicited use of its airline by the general public and, more particularly, by frequent travelers, by featuring its Program in diverse national media and by general mailings and distribution of promotional materials, including applications for membership in the Program, a list of benefits and facilities available, and a delineation of the mileage credits required to obtain the specifically listed benefits.

4. To induce persons to join the Program and to fly American and otherwise use the Program, defendant sent further explanatory materials detailing the available benefits and the mileage credits required therefor. The greater the number of mileage credits a member accumulated, the greater the benefits he or she was entitled to receive.

5. Prior to June 1, 1988, the named plaintiff accepted defendant's offer to join the Program; used defendant's airline, even if more costly or less convenient than others; used the services and facilities of others participating with defendant in the Program; and received and accumu-

lated mileage credits for the miles traveled and services and facilities used. As a result, prior to June 1, 1988, plaintiff had accumulated and still retains mileage credits in the Program.

6. Plaintiff brings this action on behalf of herself and a class of persons who joined the Program prior to June 1, 1988, and who accumulated mileage credits as of such date, which they either still retain or plan to use in whole or part after June 1, 1988. The value of those credits was substantially and adversely affected by defendant who, effective June 1, 1988, announced numerous changes in the Program retroactively applicable even to those mileage credits accumulated prior to the changes.

7. The class of persons affected by the foregoing is so numerous, consisting of approximately four million members, that joinder of all members is impracticable.

8. Questions of fact and law common to the Class predominate over questions affecting only individual members of the Class. Common questions of fact and law include the following:

(a) whether defendant breached its contractual obligations when, after plaintiff and each Class member had accepted defendant's offer to join the Program and had travelled upon defendant's airline or used the services of other participants in the Program and had accumulated mileage credits, defendant altered the provisions of the Program so as to substantially and adversely affect each class member's accumulated mileage credits; and

(b) whether defendant violated the Illinois Consumer Fraud and Deceptive Business Practice Act (Ill. Ann. Stat. ch. 121½, § 261, *et seq.*) by the conduct complained of herein.

9. The named Plaintiff and her counsel will fairly and adequately protect the interests of the Class. Plaintiff, like all other members of the Class, had mileage credits

in the Program accumulated prior to June 1, 1988, which were adversely affected by defendant's action in a like manner, though not necessarily to the same extent, as all other members of the Class. Plaintiff is represented by counsel experienced in Class Action litigation.

10. A Class Action is the most fair, just and efficient manner in which to adjudicate the claims arising out of defendant's conduct. Should individual actions be brought, or be required to be brought by each individual member of the Class, the resultant multiplicity of lawsuits would cause undue hardship and expense for the Court and the litigants. The prosecution of separate actions would also create a risk of inconsistent rulings which might be dispositive of the interests of other Class members not parties to the adjudications or substantially impede their ability to protect their interests.

STATEMENT OF CLAIM

11. Through the described solicitation of Class members, defendant made a unilateral offer to plaintiff and each Class member which each accepted by joining the Program prior to June 1, 1988, and by traveling on defendant's airline and/or using the facilities and services of other participants in the Program. As a result, plaintiff and the Class earned mileage credits under the Program which the defendant induced them to retain, increase, and accumulate.

12. As such mileage credits were earned and accumulated by plaintiff and each Class member, each acquired a vested contractual right to receive from defendant, and defendant became contractually obligated to furnish to plaintiff and each Class member, the benefits to which said mileage credits were entitled under the Program in effect when the mileage credits were earned and accumulated. Although defendant reserved the right to restrict, suspend, or otherwise alter aspects of the Program, it could not do so retroactively as to mileage credits which had

theretofore been earned and accumulated under the Program.

13. Among the benefits to which plaintiff and each member of the Class were entitled by reason of the mileage credits earned and accumulated prior to June 1, 1988, were the following: (a) for 12,000 mileage credits accumulated, an upgrade from coach to first class on any one round trip ticket purchased, including discount fare or otherwise restricted tickets with advance purchase requirements tickets; and (b) for varying amounts of mileage credits accumulated, various first class and other class tickets to applicable destinations on available dates for any of a specified number of seats available in that class of service and upgrading of tickets from coach to first class for domestic or international destinations.

14. Effective commencing June 1, 1988, defendant unilaterally commenced a process pursuant to which it is altering the benefits available to participants in the Program, not only with reference to mileage credits earned and accrued thereafter, but also retroactively for all mileage credits which plaintiff and other members of the Class had earned and accumulated prior to June 1, 1988. Furthermore, American's actual and proposed changes are designed to make it substantially harder to earn travel benefits subsequent to July 1, 1989. In addition, American is instituting capacity control restrictions which will make it substantially more difficult for Program members to redeem their mileage credits for the benefits promised to them. These capacity control restrictions include a greater number of blackout dates, during which no flights are available, and limitation of the number of seats allocated to Program members seeking to redeem their mileage credits.

15. American's modified frequent flyer program will have two award levels. One, called Plan AAhead, has lower requirements for benefits but greater restrictions on their use. The other, called AAnytime, requires higher

mileage for benefits but has no blackout dates or other restrictions.

16. In general, travel at peak hours and days—when airlines have the least trouble filling seats—will be available as a frequent flier benefit only in the AAnytime award program.

17. For instance, under the old award structure, it took 50,000 miles to earn two free coach tickets to Hawaii. Under the new structure, it will take 60,000 miles to get two coach tickets under Plan AAhead awards, and 120,000 miles for two AAnytime award tickets.

18. Under the old rules, there are certain blackout dates when awards cannot be used, which was the only major restriction American imposed. In the future, the restricted Plan AAhead awards will be available on "up to 50 percent" of all the available American airliner seats, a substantial reduction for most flights.

19. Another key change reduces the minimum number of miles credited to a member's account for each flight taken, from 750 to 500 or the actual number of miles flown, whichever is greater.

20. Through this unilateral reduction of benefits for mileage credits earned prior to the changes being made and which each traveler was induced by defendant to increase and accumulate, American breached its contract with the plaintiff and each Class member by, *inter alia*, reducing the number of available seats pursuant to which earned mileage credits can be used for benefits, thereby reducing the value of mileage credits accumulated to date and/or to be accumulated.

21. Unless this Court assumes equitable jurisdiction and otherwise so orders, the defendant will not only implement the foregoing changes but will continue to make additional retroactive changes in the benefits offered under the Program.

WHEREFORE, plaintiff, individually and on behalf of the Class of persons similarly situated, asks this Honorable Court:

A. To certify this claim as a Class Action in order that plaintiff and her attorneys may represent the Class of persons similarly situated;

B. For judgment against defendant for damages in the amount that the value of the mileage credits earned and accumulated by plaintiff and members of the Class prior to June 1, 1988 was lessened by virtue of the defendant's conduct, together with such punitive damages as may be found appropriate;

C. To enter a preliminary and permanent injunction enjoining defendant from applying retroactively any of the changes in benefits which it has purported to place into effect, as well as any subsequent changes in the Program which defendant may hereafter make which reduce the benefits available under the Program to mileage credits already earned and accumulated;

D. To award costs and reasonable attorneys' fees incurred on behalf of the plaintiff and members of the Class in connection with the prosecution of this cause; and

E. For such other relief as this Court may deem fit to grant in fashioning a remedy for plaintiff and members of the Class.

COUNT II
(AT LAW)

CLASS ACTION

1-9. Paragraphs 1 through 9, inclusive, of Count I are hereby realleged as if fully set forth in Count II.

STATEMENT OF CLAIM

10-21. Paragraphs 10 through 21, inclusive, of Count I are hereby realleged as if fully set forth in Count II.

WHEREFORE, plaintiff, individually and on behalf of the Class of persons similarly situated, asks this Honorable Court:

A. To certify this claim as a Class Action in order that plaintiff and her attorneys may represent the Class of persons similarly situated;

B. For judgment against defendant for damages in the amount that the value of the mileage credits earned and accumulated by plaintiff and members of the Class prior to June 1, 1988 was lessened by virtue of the defendant's conduct, together with such punitive damages as may be found appropriate;

C. To enter a preliminary and permanent injunction enjoining defendant from applying retroactively any of the changes in benefits which it has purported to place into effect, as well as any subsequent changes in the Program which defendant may hereafter make which reduce the benefits available under the Program to mileage credits already earned and accumulated;

D. To award costs and reasonable attorney's fees incurred on behalf of the plaintiff and members of the Class in connection with the prosecution of this cause; and

E. For such other relief as this Court may deem fit to grant in fashioning a remedy for plaintiff and members of the Class.

COUNT III
(IN CHANCERY)

CLASS ACTION

1-9. Paragraphs 1-9, inclusive, of Count I are hereby realleged as if fully set forth in Count III.

STATEMENT OF CLAIM

10. Plaintiff and each member of the Class were induced to believe by defendant's solicitations and promises

that by joining the Program and using defendant's airline and or the services and facilities of other Program participants, each would earn specified mileage credits which, if accumulated, could be redeemed for specified benefits, including air travel tickets and ticket upgrades. By making greater travel benefits available through redemption of correspondingly greater accumulated mileage credits, defendant induced plaintiff and members of the Class to increase, hold and accumulate their mileage credits.

11. Consequently, plaintiff and members of the Class joined the Program and traveled on defendant's airline and or used the facilities of other Program participants in order to accumulate the greater mileage credits necessary to obtain correspondingly greater travel benefits.

12. Prior to June 1, 1988, plaintiff and members of the Class were entitled to redeem their accumulated mileage credits for specified travel benefits, such as airline tickets and ticket upgrades from coach to first class.

13. Effective commencing June 1, 1988, defendant unilaterally commenced a process pursuant to which it is altering the benefits available to participants in the Program, not only with reference to mileage credits earned and accrued thereafter, but also retroactively for all mileage credits which plaintiff and other members of the Class had earned and accumulated prior to June 1, 1988. Furthermore, American's actual and proposed changes are designed to make it substantially harder to earn travel benefits subsequent to July 1, 1989. In addition, American is instituting capacity control restrictions which will make it substantially more difficult for Program members to redeem their mileage credits for the benefits promised to them. These capacity control restrictions include a greater number of blackout dates, during which no flights are available, and limitation of the number of seats allocated to Program members seeking to redeem their mileage credits.

14. During the year 1988, in particular, defendant induced plaintiff and members of the Class to fly even more frequently on defendant's airline by offering "Triple Mileage" for each actual mile flown. Defendant offered "Triple Mileage" even though it knew that it would change the terms of the Program and institute capacity control restrictions which would have the effect of substantially reducing the value of accumulated mileage credits.

15. At no time did defendant—while inducing plaintiff and members of the Class to earn and accumulate mileage credits—ever advise plaintiff and members of the Class that defendant believed it had reserved the right to retroactively restrict, suspend or otherwise alter or reduce the benefits available under the Program and that defendant would take such action whenever it determined that it would be benefitted by so doing.

16. As a direct and proximate result of defendant's conduct complained of herein, the value of the mileage credits earned and accumulated by plaintiff and members of the Class was substantially reduced.

17. At all times relevant and material to this Complaint there was in full force and effect, as Section 261, *et seq.*, of Chapter 121½ of the Illinois Annotated Statutes, an Act entitled: "The Consumer Fraud and Deceptive Business Practices Act" (the "Act").

18. The foregoing wrongful acts and omissions of defendant constituted violations of the Act which resulted in plaintiff and each member of the Class suffering damages as described above.

19. Section 10 of the Act authorizes any person who suffers damages as a result of a violation of the Act to bring an action against any other person who committed the violation for such relief as the Court deems fit, including reasonable attorneys' fees and costs.

20. The plaintiff, the members of the Class, and the defendant are each "a person" as defined by the Act.

21. Unless this Court assumes equitable jurisdiction and otherwise so orders, the defendant will not only implement the foregoing changes but will continue to make additional retroactive changes in the benefits offered under the Program.

WHEREFORE, plaintiff, individually and on behalf of the Class of persons similarly situated, asks this Honorable Court:

A. To certify this claim as a Class Action in order that plaintiff and her attorneys may represent the Class of persons similarly situated;

B. For judgment against defendant for damages in the amount that the value of the mileage credits earned and accumulated by plaintiff and members of the Class prior to June 1, 1988 was lessened by virtue of the defendant's conduct, together with such punitive damages as may be found appropriate;

C. To enter a preliminary and permanent injunction enjoining defendant from applying retroactively any of the changes in benefits which it has purported to place into effect, as well as any subsequent changes in the Program which defendant may hereafter make which reduce the benefits available under the Program to mileage credits already earned and accumulated;

D. To award costs and reasonable attorney's fees incurred on behalf of the plaintiff and members of the Class in connection with the prosecution of this cause; and

E. For such other relief as this Court may deem fit to grant in fashioning a remedy for plaintiff and members of the Class.

COUNT IV
(AT LAW)

CLASS ACTION

1-9. Paragraphs 1 through 9, inclusive, of Count III are hereby realleged as if fully set forth in Count IV.

STATEMENT OF CLAIM

10-21. Paragraphs 10 through 21, inclusive, of Count III are hereby realleged as if fully set forth in Count IV.

WHEREFORE, plaintiff, individually and on behalf of the Class of persons similarly situated, asks this Honorable Court:

A. To certify this claim as a Class Action in order that plaintiff and her attorneys may represent the Class of persons similarly situated;

B. For judgment against defendant for damages in the amount that the value of the mileage credits earned and accumulated by plaintiff and members of the Class prior to June 1, 1988 was lessened by virtue of the defendant's conduct, together with such punitive damages as may be found appropriate;

C. To enter a preliminary and permanent injunction enjoining defendant from applying retroactively any of the changes in benefits which it has purported to place into effect, as well as any subsequent changes in the Program which defendant may hereafter make which reduce the benefits available under the Program to mileage credits already earned and accumulated;

D. To award costs and reasonable attorney's fees incurred on behalf of the plaintiff and members of the Class in connection with the prosecution of this cause; and

E. For such other relief as this Court may deem fit to grant in fashioning a remedy for plaintiff and members of the Class.

Dated: January 6, 1989.

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APPENDIX F

National Association of Attorneys General, Task Force on the Air Travel Industry, Revised Guidelines (Excerpts)

SECTION 3—Frequent Flyer Programs
General Comments to Section 3

Frequent flyer programs have been widely acknowledged as the most successful marketing programs in airline industry history. The bargain struck between customers and the airlines has proven to be very costly to many of the airlines. Customers who have accrued the necessary mileage are expecting to collect the awards which led them to join and fly in the programs in the first place. Some airlines are now disturbed by the cost of keeping their side of the bargain and the real possibility that they may lose revenue because passengers flying on frequent flyer awards may begin displacing paying customers. The solution contemplated by some carriers has been to raise award thresholds and implement restrictions to decrease the cost to them of the award program. The effect of these actual and/or potential changes is to significantly devalue vested members' accrued mileage or other credits in the program. Although various frequent flyer program awards materials have contained some obscure mention of the possibility of future program changes, these disclosures have been wholly inadequate to inform program members of the potentially major negative changes which are contemplated by many airlines.

These Guidelines cover frequent flyer programs including any partner airlines or other providers of goods or services such as rental cars and hotel rooms. They are intended to protect those consumers who have participated in these programs in good faith, without adequate notice that the programs could change, and to advise the airlines of how they can reserve this right in the future by adequately providing this information to all members in a nondeceptive manner consistent with state law.

3.0 Capacity controls

1. If an airline or its program partners employ capacity controls, the airline must clearly and conspicuously disclose in its frequent flyer program solicitations, newsletters, rules and other bulletins the specific techniques used by the airline or program partner to control capacity in any solicitation which states a specific award. This includes blackout dates, limits on percentage of seats (for example, "the number of seats on any flight allocated to award recipients is limited"), maximum number of seats or rooms allocated or any other mechanism whereby the airline or program partner limits the opportunities of program members redeeming frequent flyer award levels. To meet this Guideline, all blackout dates must be specifically disclosed.

2. As to awards for vested miles, the airline or program partner must provide the award to the vested member without capacity controls or provide the award with capacity controls within a reasonable period of time. A reasonable period would be within 15 days before or after the date originally requested. If all seats within this 31-day period were sold at the time the vested member requested a reservation, so that the member could not be accommodated without displacing a passenger to whom a seat has been sold, then a reasonable period would be the period to the first available date on which every seat was not sold to the requested destination at the time the program member requests a reservation.

Comment: All of the airlines that met with the Task Force stated that they intended to retain the right to impose capacity controls, in the future, to limit the number of seats available to consumers purchasing tickets with frequent flyer award certificates. The imposition of capacity controls, including blackout dates, has the potential for unreasonably restricting the supply of seats or other benefits in such a way as to significantly devalue the awards due vested program members. NAAG found that this potential limitation has not been adequately dis-

closed to program members in the frequent flyer promotional materials we reviewed. This Guideline puts the airline on notice as to what information they should provide to consumers if they want to impose capacity controls on the use of frequent flyer awards at some future date.

In earlier drafts of the Guidelines the Task Force took the position that capacity controls could not be applied to awards based on any mileage or credits accrued by vested members before they received adequate notice that capacity controls could be imposed. However, as a compromise, and to permit the airlines reasonable flexibility around holiday or other peak travel times, the revised Guideline provides for a reasonable time to accommodate passengers with award tickets: a 31-day "time window" —15 days before and 15 days after the date requested for ticketing. This "time window" allows the airlines to allocate capacity to meet demand over a reasonable, yet defined period of time. In the event all flights to a certain destination are sold out during the entire 31-day time window, ticketing on the next available seat would be reasonable. This approach has the additional benefit of being simple and straightforward to implement with less possibility of customer confusion and frustration.

3.1 Program changes affecting vested members

1. Any airline or program partner that has not reserved the right to make future changes in the manner required by Sections 3.2 and 3.9 of these Guidelines and that changes any aspect of its program (for example, imposition of capacity controls, increases in award levels, or any other mechanism whereby a vested member's ability to redeem any award will be adversely affected) must protect vested program members. Examples which meet this Guideline are:

(a) All vested members may not be adversely affected by that change for a reasonable period [which] would be one year following mailing of notice of that change.

(b) The airline or program partner may allow vested members to lock in any award level which is in effect immediately preceding any change in the program. That award level would be guaranteed for a period of one year after mailing notice of any increase in award levels. A vested member would also be permitted to change his or her selection to lock in a different award in existence at any time prior to an increase in award levels.

(c) The airline or program partner may credit vested program members with miles or other units sufficient to assume that, at the time of any change in the program, the member will be able to claim the same awards he or she could have claimed under the old program.

Comment: This Guideline institutes corrective measures to protect vested members and the mileage they accrued before receiving adequate notice that a program could change to their detriment at some point in the future. The Guideline sets forth three acceptable alternative approaches to allow airlines to change existing programs without unreasonably altering the rights and expectations of vested members. For example, an airline may wish to create a new program with higher award levels for persons who join in the future. Guideline 3.1.1(a) grandfathers in vested members for a one-year period after notice. Guideline 3.1.1(b) grandfathers only a specified locked-in award for a one-year period after the effective date of the change and thereby gives the member an additional year to accrue mileage or units toward a specific award. Guideline 3.1.1(c) allows the program to avoid the administrative problems of distinguishing between old and new members and old and new award levels by equitably adjusting the award levels of the vested members.

These examples are not the only ways in which airlines can reasonably protect vested members when changing existing programs. They are intended to delineate minimum acceptable standards.

3.2 Notice of Changes

1. Adequate notice of changes in current frequent flyer program award levels must be provided to vested program members by the airline or program partner to allow a reasonable time for the vested member to obtain and use an award. For example, a notice no less than one year prior to the effective date of such change would be reasonable. Reduction in award levels would not require such notice. 2. Any airline which has a policy of deleting program members from its mailing list for notices and statements must clearly and conspicuously disclose that policy in plain language in its rules and regulations.

3. To reserve the right to make future changes in the award levels and program conditions or restrictions in a manner providing reasonable notice consistent with state law, which notice is less than the notice set forth in Guideline 3.2.1, an airline must first clearly and conspicuously disclose that reservation and the nature of such future changes, in plain language. This disclosure should include examples which make clear the outer limits within which program awards may be changed. For example, the following is not adequate disclosure:

"Program rules, regulations and mileage levels are subject to change without notice."

This example is adequate disclosure:

"(Airline) reserves the right to terminate the program with six months notice. This means that regardless of the amount you participate in this program, your right to accumulate mileage and claim awards can be terminated six months after we give you notice."

Or:

"(Airline) reserves the right to change the program rules, regulations, and mileage level. This means that (Airline) may raise mileage levels, add an unlimited number of blackout days, or limit the number of seats

available to any or all destinations with notice. Program members may not be able to use awards to certain destinations, or may not be able to obtain certain types of awards such as cruises."

Or, if the airline so intends, the disclosure might also say:

"In any case, (Airline) will make award travel available within — days of a program member's requested date, except for blackout dates listed here."

The airline's right to make future changes, in a manner other than that provided in Guideline 3.1, shall apply only to mileage accrued after members receive the notice required by this Guideline.

Comment: In the past, airlines have attempted to reserve the right to make radical future changes in their programs by using such vague and uncertain blanket language as "Subject to additions, deletions, or revisions at any time." The consumer outrage that ensued when several of the major airlines attempted unilaterally to change their programs in the winter of 1986-87 makes it clear that consumers were not adequately told, when they joined and participated in frequent flyer programs, that they were taking a gamble that the award they were striving for would still be available, at the mileage level originally advertised by the time they accrued the necessary miles. To avoid a recurrence of this same problem in the future, this Guideline provides that the potential for such extensive program changes must be clearly and conspicuously disclosed to the public by specific example. It also puts the airlines on notice that (1) their previous attempts to disclose this critical information have been inadequate (2) if they intend to reserve the right to make such changes in the future, they must give members new and different notice, and (3) as to vested members, airlines cannot implement any adverse changes until one year after notice is given. One year is deemed rea-

sonable because many consumers can only travel during particular periods of the year due to work or family constraints, and therefore notice of less than a year may impact unduly harshly on a particular class of program members.

If an airline wants to reserve the rights to change the terms of its program without giving its members one year's notice (1) it can do so only after clear and adequate notice has been given to the program members and (2) this reduced standard can apply only to mileage accrued after clear and adequate notice has been given.

NAAG discovered that many airlines delete program members from their mailing lists if they are determined to be "inactive." Inactive is defined differently by each airline, but generally includes some formula requiring active participation in the program within a six to ten month period prior to any given mailing. Because crucial information regarding changes is included in program mailings, the Guidelines require that any airline with a policy of deleting program members from its mailing list clearly and conspicuously disclose that policy in the rules and regulations distributed to all program members when they join.

3.3 Fare or passenger class limitations

Any limitation upon the type or class of fare with which an upgrade certificate, discount flight coupon, or free companion coupon may be used must be clearly and conspicuously disclosed before the program member claims the award. Disclosure of the fare by airline terminology (for example, "Y Class") is not deemed sufficient.

Comment: Many airlines are encouraging consumers to use their accrued mileage or credits to obtain upgrade certificates or free campaign coupons, rather than free tickets because this is more cost effective for the airlines. Many of these coupons and certificates can be used only

in conjuction with a regular coach fare ticket. Because of the high cost of a full coach ticket (often disclosed only as "Y Class") many of these coupons and certificates represent no real savings and therefore are useless to consumers. This Guideline requires that any such restriction be clearly disclosed to consumers before the award is claimed.

3.4 Certificates issued for vested miles

Certificates, coupons, vouchers, or tickets issued by an airline for awards redeemed for vested miles must be valid for a reasonable period of time. One year is deemed to be reasonable. Any restrictions on use, redeposit, extension, or re-issuance of certificates must be clearly and conspicuously disclosed on the certificate and in any rules, regulations, newsletter or other program materials.

Comment: Again, because many consumers may only travel during certain periods of the year, fairness requires that awards be valid for at least a full twelve month cycle.

3.5 Fees

Any airline which charges a fee for enrollment in its frequent flyer program must fully disclose at airline ticket counters and in all advertisements, solicitations or other materials distributed to prospective members prior to enrollment all terms and conditions of the frequent flyer program. Such disclosure must be made prior to accepting payment for enrollment in the airline's program.

Comment: Some airlines have required that consumers fill out a membership application and pay a membership fee before obtaining a copy of the program rules and regulations. Because of the serious restrictions that can apply to a travel reward program, it is essential that all consumers have an opportunity to review all of the program rules and regulations before paying an enrollment fee.

3.6 Redemption time

All airlines must disclose clearly and conspicuously the actual time necessary for processing award redemption requests where such requests are not normally processed promptly. An example of prompt processing would be within 14 days of processing the request. An example of a disclosure would be "processing of awards may take up to 30 days."

Comment: The airlines indicated that full disclosure of redemption time will not be a problem.

3.7 Termination of program affecting vested members

In the event a frequent flyer program is terminated, adequate notice of termination must be sent to all vested members so that vested members have a reasonable time to obtain awards and use them. Adequate notice would be notice at least one year prior to the termination of the program. Award levels in existence prior to such notice should remain in effect for one year. Program members should then have one year to use certificates, coupons, vouchers or tickets. Any applicable capacity controls should be modified as necessary to meet the demand for all award benefits due program members.

Comment: The airlines uniformly take the position that because participation in travel reward programs is "free," an airline should be able to terminate a travel reward program at any time without notice. NAAG strenuously disagrees. Consumers pay significant consideration for the airlines' promise to award them "free tickets" and other awards. Program members fly on a particular airline to accrue mileage in a travel reward program often foregoing a more convenient departure time, a more direct flight, and even a less expensive ticket. Those consumers who kept their part of the bargain have a right to expect the airlines to keep theirs, regardless of the cost. This Guideline affords consumers reasonable protection against unilateral changes. It gives consumers one year to accrue the mileage to reach a desired award level and one year to use the award.

This Guideline is intended to apply to programs that are terminated due to mergers or for any other reason. It would be unconscionable to permit airlines, which have reaped the rewards of these travel incentive programs, to walk away from their obligations to consumers under any circumstances.

3.8 Restrictions

All material restrictions on frequent flyer programs must be clearly and conspicuously disclosed to current program members and to prospective members at the time of enrollment.

Comment: This Guideline is intended as a corrective measure. Any airline that has not clearly and conspicuously disclosed material program restrictions to vested members should do so now. New members are entitled to full disclosure at the time of enrollment.

3.9 Method of disclosure

Disclosures referred to in these Guidelines should be made in frequent flyer program solicitations, newsletters, rules, and other bulletins in a clear and conspicuous manner so as to assure that all program members receive adequate notice. As used in these Guidelines, disclosure also refers to information on program partners.

Comment: The brochures containing the rules and regulations for airlines' frequent flyer programs have been as long as 52 pages. Extremely important restrictions are often buried under inappropriate topic headings or hidden on the back of the last inside pages of the brochure. This Guideline requires that restrictions be disclosed in reasonable print size in a location that will be most helpful and informative to consumers.

Any reservation of the right to make future changes in a program is so significant to consumers that it should be disclosed prominently to insure that the maximum number of people see and read this restriction. The Guide-

line permits the airlines flexibility to determine when and how often a disclosure must be made so long as the airline discloses the information in a manner which gives meaningful notice to all affected members.

One airline complained that Guideline 3.9 is unreasonable because it proposes that all the restrictions be disclosed at the beginning of the program brochure. In fact, the only disclosure the Guidelines suggested listing at the beginning of a brochure is the reservation of the right to change the program prospectively. The significance of such a restriction—that the terms and conditions of the program can change at any moment—is so critical that potential members should be made aware of it immediately. All other disclosures can be made in the text of the brochure.

APPENDIX G

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 29th day of May, 1992

Docket 46280

COMPLAINT OF ASSOCIATION OF DISCOUNT TRAVEL BROKERS

against

CONTINENTAL/EASTERN TARIFF, C.A.B. NO. 409

Docket 47539

RULEMAKING PETITION OF ASSOCIATION OF
DISCOUNT TRAVEL BROKERS

on

FREQUENT FLYER PROGRAMS AND AWARDS

ORDER DISMISSING COMPLAINT AND DENYING PETITION FOR RULEMAKING

On May 8, 1989, the Association of Discount Travel Brokers ("the Association") filed a complaint against a

tariff of Continental Airlines, Inc. and Eastern Air Lines, Inc. that revised their One Pass frequent flyer program's rules and awards.[1] On May 16, on behalf of itself, Eastern, and One Pass, Continental filed a motion for leave to file out of time, which we will grant, and an answer in opposition to the Association's complaint.

Subsequently, on May 13, 1991, the Association filed a petition for rulemaking on the use and transfer of frequent flyer program awards. Trans World Airlines, Inc. ("TWA") in conjunction with Northwest Airlines, Inc. ("Northwest"), American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta"), and Continental Airline, Inc. ("Continental") filed responses to the petition for rulemaking. The Association then filed a reply to the responses.

For the reasons stated below, we will dismiss the complaint and deny the petition for rulemaking.

I. Tariff Complaint

A. The Complaint

The Association challenges the following revisions to the Continental-Eastern One Pass Tariff:

(a) the revision reserving the right to modify, suspend, restrict, or otherwise alter all or part of the One Pass program upon 60 days' notice to active members;

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[1] Under sections 221.250 and 302.505(b) of the Department's regulations (14 CFR 221.250 and 302.505(b)), a complaint requesting suspension of a tariff must be filed within ten days after the tariff's issuance date. The Association states that the geographically diverse situation of its members prevented it from meeting this deadline. We will treat this statement as a request for leave to file an otherwise unauthorized document (see 14 CFR 302.4(f)), which we will grant.

Since the filing of the complaint, Eastern Air Lines, Inc., has undergone liquidation under Chapter 7 of the bankruptcy laws.

(b) the revision making fraud or abuse concerning One Pass mileage credit or reward usage subject to penalties, including termination of participation in the program and forfeiture of all accrued mileage, reward certificates, and tickets issued against reward certificates;

(c) the revisions banning the sale, barter, or purchase of One Pass rewards, defining the sale, barter, and transfer of rewards or certificates other than as expressly permitted as fraud or abuse, making any rewards obtained by fraud or abuse void if transferred for cash or other consideration, and declaring that persons other than the individuals named on certificates who attempt to use them will be denied transportation and the certificates deemed void; and

(d) the revision providing for capacity controls that limit the availability of seats offered for reward travel on certain flights and during certain times of the year.

The Association challenges the tariff as procedurally deficient, restrictive to price competition in air transportation, and unfair and unreasonable to consumers. First, it claims that these four provisions make material changes to the existing tariff "that severely restrict the benefits and rights of the frequent flyer." Contending that section 221.165 of the Department's rules (14 CFR § 221.165) requires an explanation for such substantive changes to consumer benefits, the Association argues that Continental's and Eastern's failure to supply such information violates our rule.

Second, the Association claims that its members conduct a legitimate business as discount brokers, and it charges Continental and Eastern (as well as other air carriers with frequent flyer programs) with improperly attempting to destroy this business. It is to this end, according

to the Association, that the airlines "started to include restrictions against transferability in the tariff, together with capacity controls, blackout dates[,] and the unilateral right for the airline to do as it desired to any part of its program."[2]

Third, the Association charges the Department of Transportation with failing to protect consumers by not adequately reviewing frequent flyer rules filed as tariffs. The Association also accuses the Department of granting Special Tariff Permission to frequent flyer tariffs without a showing of emergency or merit in violation of section 221.190 of our own rules (14 CFR § 221.190). It argues that once these tariffs have been approved, if carriers successfully argue in lawsuits that they have the force of law, consumers have no recourse.

Fourth, in addition to these general complaints, the Association states specific grievances against each of the four revisions listed above. The Association challenges revision (a) on the grounds that guidelines adopted by the National Association of Attorneys Generals ("NAAG") for frequent flyer programs would require notice of at least one year before an airline could terminate its program. The Association challenges revision (b) by claiming that the Department has never considered the reasonableness of such restrictive provisions and should do so "before allowing the consumer to be unreasonably penalized." It challenges revision (c) as a direct and illicit means of driving discount coupon brokers out of business. It challenges revision (d) as a tool that allows the airlines unfairly to "lure the consumer to fly . . . on the promise that the rider will earn a free trip to an exotic destination" and then either increase the mileage premium for that trip or drastically limit its availability.[3]

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[2] Complaint of Association at 9.

[3] Here, as in the case of revision (a), the Association cites the NAAG guidelines, which would require carriers to provide awards

Based on its allegations, the Association asks the Department to investigate the One Pass revisions and suspend the tariff.

B. The Answer

On behalf of itself, Eastern, and One Pass, Continental opposes the Association's complaint. In response to the contention that the Department has not adequately reviewed frequent flyer tariffs, Continental states that in 1988, the Department concluded after an informal investigation that One Pass's rules and tariff on capacity controls were proper and that there was no evidence of unfair or deceptive practices within the meaning of section 411 of the Federal Aviation Act.[4]

In response to the other allegations, Continental argues that the Association has misconstrued and misrepresented the nature of the relationship between frequent flyer programs and their members. Continental contends that the bulk of One Pass earnings and travel concern domestic air transportation, in which the relationship between air carriers and passengers has been governed since 1983 solely by contract law.[5] Continental characterizes the revisions challenged by the Association as legitimate terms of the carriers' unilateral offer and part of their legitimate contract with One Pass members.[6]

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either without capacity controls or, if capacity controls apply, within 15 days before or after the date originally requested. If all seats within this 31-day period were sold at the time the request was submitted, then the guidelines would require the airline to provide a seat on a date as close as possible to the date requested.

[4] Response of Continental at 2-3.

[5] Continental claims that One Pass gives its members copies of the program's rules when they apply for membership and keeps them apprised of all changes.

[6] Continental argues, with many case citations, that a common carrier may prohibit its customers from selling their rights to travel at reduced fares and that in particular, an air carrier may prohibit the sale of its frequent flyer awards.

Continental denies that the challenged revisions are novel and asserts instead that they predate the tariff filing and have the force of contract apart from their inclusion in the tariff.[7] Specifically, Continental asserts, these provisions have formed part of the One Pass program since its inception, and the program's applicants and members have always been notified of all applicable terms and conditions, including these provisions.

As for capacity controls, Continental denies that it or Eastern engages in misleading advertising, fails to provide award transportation at the mileage advertised, or fails to provide adequate capacity for award travel. Continental asserts that it and Eastern scrupulously adhere to the capacity provisions in the One Pass terms and conditions, and it repeats its assertion that these provisions have always been part of the program.[8]

II. Rulemaking Petition

A. The Petition

The proposed rulemaking has four principal elements: (1) elimination of sale and transfer restrictions on awards, (2) elimination of excessively restrictive capacity controls, (3) elimination of unreasonable blackout dates, and (4) notice of program changes.[9] The Association claims that the proposed rule is designed to establish a uniform, nationwide frame of reference for resolution of the areas of major controversy surrounding the award, transfer, sale, or use of frequent flyer mileage

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[7] According to Continental, substantially all of One Pass terms and conditions now appear in the tariff.

[8] Continental asserts that the original One Pass terms and conditions stated as follows:

> Reward usage is subject to capacity controls which limits [*sic*] the availability of seats offered for reward travel on certain flights and during certain times of the year.

[9] Association Petition for Rulemaking at 7-8.

awards. The Association's arguments in support of its claims are substantially similar to those in its complaint and include the promotion of competition among air carriers, the protection of consumer interests from allegedly deceptive and unfair practices [under § 411 of the Federal Aviation Act], such as capacity controls, blackout dates, award structure/mileage requirements, and transferability restrictions, and the prevention of the airlines' improper attempt to destroy a legitimate business.

The Association analogizes the frequent flyer program with the "S&H Green Stamps frequent buyer program" at issue in *In re Sperry & Hutchinson Co.*, 73 F.T.C. 1099 (1968). The Federal Trade Commission in that case initially found similar acts, such as the transferability restrictions, to have violated the FTC Act, a statute the Association argues is substantially the same as § 411 of the Act.

B. The Responses

The respondents generally oppose the proposed regulations on the basis that (1) they deal with issues already resolved in court or pending in litigation, (2) they are impracticable, (3) discount brokers conduct illegal activity by defrauding the airlines, and (4) frequent flyer program rules are not unfair or discriminatory.

The respondents contend that the proposed regulations address issues that have already been resolved in the courts or are subject to pending litigation. American, in particular, notes that recent court decisions are based on longstanding precedent and principles confirming that "(1) a prohibition against purchasing and selling frequent flyer awards is a valid and enforceable contractual restriction on assignment; and (2) there are no complex unresolved issues—and never were—regarding the illegality of the brokers' conduct."[10] American further notes

[10] Response of American at 7.

that virtually every argument that the Association advances in its petition failed to gain acceptance in frequent flyer litigation, including the premises that frequent flyer members have vested property rights to travel awards and that airline program rules are unfair trading practices and violate the Sherman Act. American and Delta specifically note that, under the final FTC consent order, S&H was expressly *permitted* to continue to restrict the transferability and exchange of its stamps. *Sperry & Hutchinson Co.*, 83 F.T.C. 478 (1973).

According to American and the other respondents, the Association is in effect asking the Department to legitimize the allegedly illegal activities of the discount brokers, who engage in systematic fraud and deception in order to conduct their business. According to the TWA/Northwest response, these activities may constitute criminal activity pursuant to 18 U.S.C. § 1343 and 18 U.S.C. § 1341. American alleges that some brokers' contracts with their customers use indemnification language that makes the customers liable for the brokers' unlawful conduct.[11] In fact, American claims that the brokers often use the same contract transferability restriction with their own customers that they claim is unfair and discriminatory on the part of airlines.[12] Delta contends that the brokering operations violate the Lanham Act and commercial disparagement, false advertising, and unlawful racketeering activities in violation of the Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.

Furthermore, the respondents contend that it would be impracticable for the Department to involve itself in what are essentially business decisions regarding ongoing advertising and promotional programs. Frequent flyer programs extend beyond the airlines to telephone companies,

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[11] *Id.* at 12.

[12] *Id.*, at 11, footnote 11.

car rental companies, hotels, and credit card companies through which ancillary mileage credits can be accumulated. Consequently, awards also extend beyond free or reduced rate transportation to free or reduced rate rental cars, hotel accommodations, rail transportation, and other benefits. The respondents also argue that, if the Department adopts the proposed rule, these ancillary industries, although affected, would be beyond the jurisdiction of the Department.[13]

The respondents also contend that market forces are in a better position than the Department to correct any perceived abuses in the frequent flyer program. Presumably the first airline to adopt the "fairer" rules would gain an immediate increase in business if the present rules are as restrictive and unfair as the petitioner suggests.

The respondents take exception to the petitioner's allegations of deceptive and unfair practices. The TWA and American programs were not as wide open at their inception as the petitioner suggested. For example, mileage could only be accumulated on domestic flights, and the program was originally offered as a limited-time promotional campaign. Benefits have expanded dramatically because of market forces. With time, the program rules were liberalized by, among other things, adding other carriers as travel partners and allowing consumers to accumulate mileage on international flights. Moreover, the respondents claim that they need a certain amount of flexibility in meeting consumer needs.

The respondents claim that past changes to program award structures have not been as injurious as alleged by the petitioner. TWA specifically notes that its increase in the mileage award levels only affected certain routes. Most of the award levels remain the same as in 1981,

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[13] Responses of American and TWA at 16-17 and 4, respectively.

when TWA offered only six awards in comparison to the present 60 awards. In 1990, TWA established an Equity Miles program which allows all members with previously accumulated mileage to claim awards under either the old or new award structure. American offers flight upgrades to its members who fly so much that they arguably do not want a free trip. Delta also claims that in many cases awards are now available for lower mileage than in the early 1980s.

The respondents assert that members have had sufficient notice of the programs' governing rules. For at least eight years the contract terms of the TWA program have included a prohibition against barter, trade, or sale of the award certificates, notification of some capacity control, and notification that program rules were subject to change at any time. Similarly, American has had the same no-sale rule printed on its travel awards since 1983. In addition, Delta's initial rules provided that the awards were "non-transferable". In 1983 and 1985, Delta clarified these rules.

American specifically criticizes the other proposed provision regarding capacity controls and notice of program changes. For example, American characterizes the proposed provision regarding capacity controls as both "meaningless and impossible" because it would prohibit capacity controls of any type unless all seats on a flight were already reserved, including by an unlimited number of passengers using frequent flyer awards.[14] Moreover, American asserts that the Association's proposed prohibition of *all* capacity controls for two full years would make it impossible for carriers to take any measures to limit revenue displacement during that period. Similarly, Continental notes that if carriers were to be forced by regulation to make available free seats without time or route or capacity limitations, and deny themselves needed reve-

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[14] Response of American at 18.

nue, they could be forced to eliminate frequent flyer programs altogether.[15]

C. The Reply

The Association takes exception to the respondents' arguments on five grounds. First, the Association contends that the requested rulemaking is an appropriate exercise of the Department's enforcement jurisdiction under Section 411. Second, it claims that local civil court actions do not justify the summary rejection of the petition. Third, the Association claims that the petition cannot be summarily rejected on competition, cost, or industry impact grounds. It states that it does not propose any mandatory inter-carrier transfer of frequent flyer program mileage or awards, and the proposed rule is not inconsistent with reasonable carrier efforts to promote brand loyalty. The Association claims that no carrier has disputed its claim that the proposed rule can be implemented without appreciable economic harm to the industry, and it views the suggestions that the frequent flyer programs might be discontinued as unsubstantiated threats. Fourth, the Association claims that the petition cannot be summarily rejected as demonstrably unworkable. Finally, it argues that efforts to squelch secondary markets are not presumptively lawful, but rather highly suspect. It takes issue with the carriers' responses concerning the antitrust considerations of *Sperry & Hutchinson*.

III. Disposition

The One Pass revisions do not violate the Federal Aviation Act or any pertinent rules or policies of this Department. In addition, adoption of the proposed regulations is not warranted. We therefore dismiss the Association's complaint and deny the petition for rulemaking.

We have already addressed some of the issues raised in the complaint in Order 89-9-25, in which we dismissed the Association's complaint against revisions by American

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[15] Response of Continental at 3.

Airlines to its frequent flyer program. We held in that order that rules governing frequent flyer programs—as distinguished from the schedule of bonus award levels—are not required to be filed as tariffs. We also held that even if carriers do file them as clarifying information, such filing does not give these rules the legal effect of a federally approved tariff. The Association has made no effort to show why our conclusions in Order 89-9-25 are not applicable here.[16] Continental correctly describes the relationship between frequent flyer programs and their members as a contract in which the carrier offers to provide benefits subject to the program's terms and conditions and the participant accepts the offer by joining the program and flying on the carrier.[17]

Because program rules are not required to be filed and do not have the legal effect of a Federally-approved tariff, the Association's procedural challenges regarding the sufficiency of Continental's and Eastern's explanation of their revisions, a showing of emergency or merit, and the sufficiency of the Department's review must be rejected.

As for the adoption of rules regulating certain aspects of the airlines' frequent flyer programs, the Association's rulemaking petition rests on its assumption that the carriers' restrictions on the transfer or sale of frequent flyer awards, their current capacity control and blackout date practices, and their allegedly inadequate notice to consumers constitute unfair and deceptive practices and

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[16] For an explanation of this policy, see Order 89-9-25, at 4-5.

[17] Continental does err, however, in stating that in domestic air transportation, the relationship between carriers and passengers is governed solely by contract law. Section 411 of the Act, with its prohibition of unfair and deceptive practices and unfair methods of competition, still applies to domestic air transportation as well as to international air transportation, as do various regulations issued under its authority: *see, e.g.*, 14 CFR Parts 373 (concerning consumer credit), 250 (concerning denied boarding compensation), and 399.88 (concerning code sharing).

unfair methods of competition in violation of section 411.[18] The Association has failed to show, however, that the practices it challenges may violate section 411. We are therefore denying the Association's rulemaking petition.

The Association argues in part that its proposed rules are required because the carriers have engaged in deceptive practices, since program members have allegedly received too little advance notice of changes in the programs and of such restrictions as the prohibition against giving frequent flyer awards. The Association therefore asks that we adopt rules requiring carriers to give "reasonable" advance notice of capacity controls, 180 days' notice of blackout dates, and one year's notice of program changes that make it harder for members to earn or use awards.

We find that the Association has not shown that the carriers' conduct misleads or is likely to mislead program members. It has provided statements by some program members that they were unhappy with certain program changes or surprised to learn that awards could not be used on some routes at some times. Petition at 77, 82. It further alleges that most program members think they have the right to sell their awards. Petition at 38, 39. This evidence is insufficient to demonstrate actual or potential deception, and no program materials have been produced that substantiate the allegation. The Association has not shown that members are unaware that carriers reserve the right to change the terms of the programs or impose blackout dates and capacity limits. More importantly, the Association has not attempted to show that the actual notice given by any carrier is in fact inadequate. The carriers, on the other hand, state that they have given members notice of the transfer restrictions and

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[18] The Association does not seek a prohibition of frequent flyer programs or even a prohibition of all use of capacity controls and blackout dates. Petition at 2, 60, 80, 84.

program changes. The carriers also assert that they have repeatedly informed members that the program terms could be changed at any time. *See, e.g.*, Delta Response at 4-5; TWA/NW Response at 8. Given this evidence, we see no need for a general rulemaking of the type requested by the Association.

The Association further argues that a rulemaking is necessary because the challenged carrier practices are unfair methods of competition. However, the Association has not demonstrated that the carriers' frequent flyer program practices violate the antitrust laws or are analogous to antitrust law violations. In fact, the Association states that it does not claim that frequent flyer programs violate the Sherman or Clayton Acts. Petition at 60. It has also not tried to show that the program practices at issue are analogous to antitrust law violations. Consequently, the Association has failed to show that the program practices at issue are unfair methods of competition. *Cf. Continental Air Lines v. American Airlines*, Order 85-12-69 at 6 (December 24, 1985); *Air Florida v. Eastern Air Lines*, Order 81-1-101 (January 21, 1981). Furthermore, one court has held that TWA's program restrictions did not violate sections 1 or 2 of the Sherman Act. *Trans World Airlines v. American Coupon Exchange*, 682 F. Supp. 1476, 1485-1488 (C.D. Calif. 1988), *rev'd in part on other grounds*, 913 F.2d 676 (9th Cir. 1990).

While the Association nonetheless claims that the program terms at issue (*e.g.*, transfer restrictions) unreasonably limit competition, it has not explained in any detail how those practices could have such an impact. The Association asserts, for example, that the carriers' current operation of the programs keeps new firms from entering the airline industry, Petition at 4, but it never explains why its proposed rules would encourage entry or why the carriers' prohibition against selling awards discourages entry.

The carrier restrictions on the sale of awards may put the Association's members out of business by making the purchase and sale of frequent flyer awards difficult or impossible. Petition at 61-62. Nevertheless, in other industries the courts have held that a producer of a product may terminate the distribution of its product through independent wholesalers and instead distribute the product itself to consumers, at least if it has not engaged in predatory conduct and has a legitimate reason for the change in distribution. *See, e.g., Paschall v. Kansas City Star Co.*, 727 F.2d 692 (8th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 872; *Naify v. McClatchy Newspapers*, 399 F.2d 335 (9th Cir. 1979). In these circumstances, a carrier's exercise of this right with respect to program awards does not violate the antitrust laws or their spirit.

Furthermore, as is apparent from the Association's own pleadings, the carriers use their programs as a means of competing for passengers. *See, e.g.*, Petition at 19, citing Delta's triple mileage promotion. *See also Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems*, prepared by the Secretary's Task Force on Competition in the Domestic Airline Industry, at 39. Since the programs began, each carrier has greatly expanded the kinds of awards that members can obtain and the ways in which members can accumulate award miles in order to make its program more attractive. *See, e.g.*, TWA/NW Response at 5-8; American Response at 3. These facts contradict the Association's contention that the carriers operate the programs so as to reduce competition.

We also find that the program terms at issue are not unfair practices, within the meaning of section 411. In administering section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, the model for section 411, the FTC has stated that a firm's conduct may be an unfair practice if it violates public policy, is immoral, or causes substantial consumer injury not offset by any countervailing bene-

fits. Petition at 56-57. *See also FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244, n. 5 (1972). The Association has not shown that the specific practices challenged by it should be proscribed on these grounds.[19] The Association does not claim that the program terms at issue are immoral. They also do not appear to be contrary to any established public policy. In an analogous situation, the courts have found that carrier restrictions on the transfer of tickets do not violate public policy principles. *Bitterman v. Louisville & Nashville R.R.*, 207 U.S. 205, 221-222 (1907); *Trans World Airlines v. American Coupon Exchange*, 913 F.2d 676, 686-689 (9th Cir. 1990).[20]

The challenged program features, moreover, do not appear to cause unwarranted consumer injury. Instead, they seem to be legitimate methods for controlling the cost of frequent flyer plans. Without such restrictions, carriers might choose to terminate or cut back the programs. As American puts it, "Like all marketing programs, what makes frequent flyer programs possible is precisely the mutually beneficial balance which enables airlines to offer such extraordinary and valuable benefits to their members *without* suffering substantial revenue loss." American Response at 17. Even the Association admits that capacity controls and blackout dates serve a legitimate purpose by

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[19] The carriers, on the other hand, argue that we should deny the Association's petition because its members' purchase and sale of awards violates several statutes and involves the use of fraud. We need not address these contentions, for the Association has not justified conducting its proposed rulemaking under section 411

[20] The Association complains that the restrictions on using and selling awards keep corporations from using awards for business purposes, even though many program members accumulate award miles on trips paid for by their employers. Petition at 32-37. No corporation has supported the Association's petition, however, and some corporations have developed methods of recapturing awards. Petition at 35-36. Corporations can also develop means of ensuring that employees purchase the cheapest available fare rather than buy a ticket enabling them to earn award miles. Airline Marketing Practices, *supra*, at 18, 19-20.

reducing the number of paying passengers displaced by users of program awards. Petition at 80 84. Restrictions on the transfer of awards similarly limit carrier costs and revenue losses.

The Association's petition assumes in large part that we should prohibit practices considered unfair by some consumers or businesses, even if they involve no deception or threat to airline competition. This is an incorrect reading of section 411, for that section does not give us unlimited authority to regulate airline practices. To adopt the more expansive interpretation of section 411 proposed by the Association, would frustrate Congress' decision that the public will benefit if airline fares and services are determined by market forces rather than government regulation. *See Order* 89-9-25 (September 13, 1989) at 4-5. Furthermore, even apart from Congress' decision to deregulate the airline industry, the courts have held that section 5 does not give the FTC unlimited authority to proscribe competitive practices that it considers unfair or undesirable. *See, e.g., E.I. DuPont Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917.

Although it has failed to show that the carrier practices violate section 411 under our precedent, the Association argued that a Federal Trade Commission proceeding involving S&H green stamps supports its contention that the carriers' pratices should be deemed unfair methods of competition under section 411. Association Reply at 27-32. We disagree. In that proceeding, begun in the late 1960's, the FTC initially held that Sperry & Hutchinson, the seller of S&H green stamps, could not block trading stamp exchanges from buying, selling, and trading green stamps with consumers. After the courts vacated this FTC order, the agency settled the case in a way which did not block Sperry & Hutchinson from seeking to enjoin the future operation of such stamp exchanges. That resolution of the case is, of course, contrary to the Association's position here.

Finally, the Association argues that the airline industry and program members would benefit if we established uniform rules for the programs, since various state and federal courts may in effect regulate the programs through their adjudication of individual contract suits. This process assertedly may result in each state having its own rules or in the lack of any regulation of the programs, given the carriers' arguments that the states are preempted by section 105 of the Act, 49 U.S.C. 1305, from regulating the terms of frequent flyer programs.

This argument provides no basis for adopting the rules sought by the Association. First, even if uniform regulation were desirable, we could adopt such rules only if the carriers' conduct violated section 411.[21] As shown, the Association has failed to show that such violations may have occurred. Secondly, this argument assumes that some agency should be closely regulating the terms and conditions of frequent flyer programs. We disagree in light of Congress' decision to deregulate the airline industry.

In addition, we doubt that our lack of regulations will lead to significant confusion. Even though some courts have held that general state contract laws may apply to airline-consumer relationships, such state contract laws of general applicability cannot authorize a determination of whether individual terms and conditions of a carrier's program are fair and reasonable, to the extent they relate to an airlines' rates, routes and services. Such state regulation is preempted under section 105 of the Act.

ACCORDINGLY, I dismiss the tariff complaint and deny the petition for rulemaking in these dockets.

By:

JEFFREY N. SHANE
Assistant Secretary for Policy
and International Affairs

(SEAL)

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[21] *See United Air Lines v. CAB*, 766 F.2d 1107 (7th Cir. 1985).